151 U.S. 607

RECORD, CASE No. 14,140.

885

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 174.

GUSTAVE G. SHAUER, PLAINTIFF IN ERROR,

vs.

R. F. ALTERTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

FILED SEPTEMBER 9, 1890.

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1 *Summons Relief. Complaint Served.*

TERRITORY OF DAKOTA, } ss:
Second Judicial District, }

In the District Court in and for Davison County.

GUSTAVE G. SHAUER, Plaintiff,
vs.
R. F. ALTERTON, Defendant.

The Territory of Dakota sends greeting to R. F. Alterton, defendant:

You are hereby summoned and required to answer the complaint of the above-named plaintiff, a copy of which is herewith served upon you, and to serve a copy of your answer upon the subscriber, at his office, in the city of Mitchell, D. T., within thirty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer this complaint within that time the plaintiff will apply to the court for the relief demanded in the complaint.

Dated Mitchell, D. T., this 4th day of January, A. D. 1885.

A. E. HITCHCOCK,
Plaintiff's Attorney.

2 TERRITORY OF DAKOTA, } ss:
Second Judicial District, }

In the District Court in and for Davison County.

GUSTAVE G. SHAUER, Plaintiff,
vs.
R. F. ALTERTON, Defendant. } Complaint.

The plaintiff complains and alleges—

1. That on the 16th day of December, 1885, he owned and was lawfully possessed of certain personal property described as follows, to wit:

A stock of merchandise consisting of ready-made clothing, hats and caps, boots and shoes, fur goods, gloves and mittens, trunks and valises, furnishing goods, and other miscellaneous articles contained in the frame store building situated on lot No. eighteen, block No. twelve, Main street, city of Mitchell, Dakota Territory.

Also the two-story frame store building, with all the fixtures contained therein, situated on lot No. eighteen, block No. twelve, Main street, city of Mitchell, Dakota Territory, as before described, which property, including the stock of merchandise and store building, was known and designated as the "Chicago clothing house."

That the stock of merchandise above described was worth the sum of ten thousand two hundred thirty-two dollars ($10,232).

That the store building, with the fixtures contained therein,

was worth the sum of one thousand one hundred fifty dollars ($1,150).

3 2. That on the said 16th day of December, 1885, A. D., the defendant wrongfully and unlawfully took said goods and property from the possession of the plaintiff and converted them to his own use.

3. That by reason of such wrongful and unlawful taking and conversion the plaintiff has suffered and sustained damage to the amount of sixteen thousand three hundred eighty-two dollars ($16,382.)

Wherefore plaintiff demands judgment for the sum of sixteen thousand three hundred eighty-two dollars and costs of suit.

A. E. HITCHCOCK,
Plaintiff's Att'ys.

4 TERRITORY OF DAKOTA, } ss:
County of Davison, }

A. E. Hitchcock, being duly sworn; says he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the statements made therein are true to his best knowledge, information, and belief.

That this verification is not made by the plaintiff, for the reason that said plaintiff is absent from and is not a resident of the county in which affiant resides.

A. E. HITCHCOCK.

Subscribed and sworn to before me this 5th day of January, A. D. 1886.

[SEAL.] M. M. HITCHCOCK,
Notary Public, D. T.

5 TERRITORY OF DAKOTA, } ss:
Second Judicial District, }

In the District Court in and for Davison County.

GUSTAVE G. SHAUER } Answer.
vs.
R. F. ALTERTON. }

Comes now the defendant, R. F. Alterton, and for answer to the plaintiff's complaint herein says—

That he denies that the plaintiff on the 16th day of December, 1885, or at any other time owned or was in lawful possession of the goods and chattels mentioned and described in plaintiff's complaint or any of them or any part of them.

Defendant denies that the goods and merchandise described in plaintiff's complaint were or are of the value of ten thousand two hundred thirty-two dollars or any sum greater than nine thousand six hundred twenty-seven dollars and forty-nine cents, and denies that the said store building and fixtures were or are of the value of eleven hundred and fifty dollars or any sum greater than seven hundred fifty dollars.

Defendant denies that on the 16th day of December, 1885, or at any other time he wrongfully or unlawfully took said goods and chattels from the possession of said plaintiff or any of them or any part of them, and denies that he converted said property or any part thereof to his own use, and defendant denies that he has in any manner whatever converted to his own use any property whatever belonging to or possessed by said plaintiff.

Defendant denies that by reason of detention alleged in plaintiff's complaint or of any act or acts of this defendant the plain-
6 tiff sustained damage in the sum of sixteen thousand three hundred and eighty-two dollars or in any sum whatever, and defendant denies each and every allegation in plaintiff's complaint contained not heretofore specifically denied.

1. And, further answering, this defendant upon information and belief avers that on the 16th day of December, 1885, one Louis S. Shauer was indebted to Abraham Strauss, Hugo Goodman, Simon Yorndorf, and Edward Rose, partners under the firm name of Strauss, Goodman, Yorndorf & Company, in a cause of action arising upon contract, in the sum of three thousand eighty-eight dollars and seventy-five cents, two thousand one hundred twenty-five dollars and seventy-five cents of which said sum will become due and payable on February 1st, 1886, and the balance thereof, viz., the sum of nine hundred sixty-three dollars, will become due and payable on the 1st day of March, 1886.

2. Defendant upon information and belief avers that on 17th day of December, 1885, one Louis S. Shauer was indebted to John V. Farwell & Charles B. Farwell, John K. Harmon, John T. Chumasero, and John V. Farwell, Junior, partners under the firm name of John Farwell & Company, in a cause of action arising upon contract, in the sum of three hundred fifteen dollars and seventy-five cents.

3. Defendant upon information and belief avers that on the 17th day of December, 1885, the said Louis S. Shauer was indebted to Otto Striessguth and Henry T. Drake, partners under the firm name of Striessguth & Drake, in a cause of action arising upon contract, in the sum of six hundred seventy-seven dollars and twenty-five cents.

7 4. Defendant upon information and belief avers that on the 17th day of December, 1885, the said Louis S. Shauer was indebted to Conrad Gotzian and George W. Freeman, partners under the firm name of C. Gotzian & Company, in the sum of five hundred dollars.

5. Defendant upon information and belief avers that on the 17th day of December, 1885, the said Louis S. Shauer was indebted to Joseph Wineman, Loapold Wineman, and Samuel Nathan, partners doing business as Wineman's Sons & Company, in the sum of four hundred and fifty dollars.

6. The defendant upon information and belief avers that on the 17th day of December, 1885, one Louis S. Shauer was indebted to Jacob Kahn, Emanuel Nisbaum, and Henry Kahn in the sum of three hundred eighty-three dollars and fifty-seven cents.

7. Defendant upon information and belief avers that on the 18th day of December, 1885, one Louis S. Shauer was indebted to Morris Leapold, Henry Leapold, Samuel Leopold, and Charles M. Leapold, copartners under the firm name os Leapold Brothers, in the sum of two thousand two hundred seventeen dollars and sixty-three cents, which said sum will become due and payable on the 1st day of March, 1886.

8. Defendant upon information and belief avers that on the 18th day of December, 1885, the said Louis S. Shauer was indebted to Edson Keith, Alexander B. Adam, and Albert E. Paxon, partners under the firm name of Edson Keith & Company, in the sum of one thousand seven hundred forty-one dollars and thirty-eight cents, one thousand and sixty-five dollars of which said sum became due January 1st, 1886, and the balance thereof, viz., the sum of
8 six hundred seventy-six dollars and nine cents, will be due on March 1st, 1886.

9. That on the 19th day of December, 1885, the said Louis S. Shauer was indebted to Benjamin M. Einstein, Herman Herbst, and Arthur M. Einstein, partners doing business under the firm name and style of Einstein & Company, in the sum of eight hundred seventy-five dollars.

10. That on the 16th day of December, 1885, the said Strauss, Goodman, Yorndorf & Company commenced their action against said Louis S. Shauer for the indebtedness owing them as aforesaid; that on the 17th day of December, 1885, the said John V. Farwell & Company, Streissguth & Drake, C. Gotzian & Company, Wineman's Sons & Company, Jacob Kahn, Emanuel Nisbaum, and Henry Kahn each commenced their respective actions for their respective indebtedness above mentioned.

That on the 18th day of December, 1885, the said Leapold Brothers and Edson Keith & Company each commenced their respective actions for their respective indebtedness above mentioned; that on the 19th day of December, 1885, Einstein & Company commenced their action for the above indebtedness owing to them; that each of said firms commenced their separate actions in the district court in and for Davison county, Dakota, against the said Louis S. Shauer for the recovery of said money and interest owing to each of them, and which said firms issued to this defendant a summons in due form for service, and that each of said firms made application to William C. Metcalf, clerk of the district court in and for Davison county, for a warrant of attachment against the property of said Louis S. Shauer, and which said firms presented to said clerk
9 on the respective applications an affidavit, whereby it appeared that a cause of action existed against said Louis S. Shauer, specifying the amount of said claim and the grounds thereof, and that the defendant, Louis S. Shauer, had disposed of his property with the fraudulent intent to defraud his creditors, and at the same time each of said firms presented to said clerk an undertaking as by law required, with sufficient surety, to the effect that if said defendant in said action should recover judgment the plaintiff therein would pay all costs that might be awarded to the said defendant

and damages which he might sustain by reason of such attachments not exceeding the amount specified in such undertaking, and that the amount specified in each of said undertakings *were* at least as great as the sum sued for by each of said creditors, and that the sum sued for in each of said cases was more than two hundred fifty dollars.

11. That thereupon the said clerk issued the warrants of attachments against the property of the said Louis S. Shauer in each of said cases, directed to this defendant as sheriff of Davison county, Dakota, and required and commanded him to attach and safely keep all of the property of the said Louis S. Shauer within his county or as much thereof as might be sufficient to satisfy the demands of the plaintiffs in said warrants of attachments and the amount due each of said respective creditors, with interest thereon as aforesaid, being the amount of indebtedness stated in such attachments, together with all costs and expenses, and this defendant proceeded thereon in the manner required by law.

12. That each of said nine several warrants of attachments were delivered to and received by this defendant as such sheriff as aforesaid for service and execution as follows: A warrant of attachment in favor of Strauss, Goodman, Yorndorff & Company on December 16th, 1885; warrant in favor of John V. Farwell & Company, C. Gotzian & Company, Streissguth & Drake, Wineman's Sons & Company, Jacob Kahn, Emanuel Nisbaum, and Henry Kahn on the 17th day of December, 1885, and a warrant in favor of Leapold Brothers and Edson Keith & Company on the 18th day of December, 1885, and a warrant in favor of Einstein & Com*apn*y on the 19th day of December, 1885, and that under and by virtue of said nine several warrants of attachment he, said defendant, forthwith levied upon and attached certain goods, wares, and merchandise, fixtures, and building of character and description of those mentioned and described in plaintiff's complaint, and took the same into his custody, which the defendant believes to be the goods and chattels refer-ed to in plaintiff's complaint, and that the said attaching and taking as aforesaid constitute the supposed wrongful detention in plaintiff's complaint alleged.

13. This defendant upon information and belie*v* avers that the said goods, wares, and merchandise so attached and taken as aforesaid were at the time of said attaching and taking the property of said Louis S. Shauer, and that said Louis S. Shauer had an attachable interest therein, and that said goods and chattels were liable to be levied upon and taken under and by virtue of said several warrants of attachment.

14. Defendant avers that said Louis S. Shauer was in possession of said goods and chattels, and that the plaintiff in this action had and held a certain pretended bill of sale of said goods and chattels, and that said bill of sale was executed by said Louis S. Shauer with intent to defraud his creditors, and on account of such fraud was void as against the creditors of said Louis S. Shauer.

15. Defendant upon information and belie*v* avers that the pretended

sale was made for the sole purpose of defrauding the creditors of the said Louis S. Shauer; that the said Gustave G. Shauer is a brother of Louis S. Shauer, and that it was, at the time of executing the said bill of sale, agreed and understood by and between the said Gustave G. Shauer and Louis S. Shauer that said plaintiff should claim to be the owner of said property, and that he purchased the same and paid for the same, and by thus doing they would prevent and delay the creditors of said Louis S. Shauer from making thei debts, and that said Louis S. Shauer would then force his creditors to accept a small percentage in satisfaction of his debts, and that the said plaintiff accepted the said bill of sale with *with* the express purpose of assisting and conniving with said Louis S. Shauer for the sole purpose of cheating and defrauding the creditors of said Louis S. Shauer.

Defendant avers on information and belief that, at the time of said levy, the said Louis S. Shauer was and now is insolvent and unable to pay his debts, and that the plaintiff, at the time of accepting said bill of sale, had full notice and knowledge of said Louis S. Shauer's insolvency and had sufficient information then and there to put him upon inquiry; that the said Louis S. Shauer was insolvent, and that said plaintiff well knowing all the facts in reference to the insolvency of said Louis S. Shauer, and for the purpose of as-
12 sisting him, the said Louis S. Shauer, he accepted and received said pretended purchase, but that said pretended purchase was accepted without any consideration whatever.

That said plaintiff had not in any manner paid for said goods. and that the same are now held by said plaintiff in fraud of the creditors of said Louis S. Shauer.

That said Louis S. Shauer, at the time of commencing of the attachment proceedings, had not sufficient other property out of which said attachment could be made, other than the property levied upon by this defendant, and that said Louis S. Shauer now has no other property out of which said debts could be made.

Wherefore this defendant demands judgment against said plaintiff for costs and disbursements, and that said pretended sale be adjudged fraudulent and declared void as against the creditors of said Louis S. Shauer, and that said attached property be made liable in satisfaction of debts of said Louis S. Shauer.

DILLON & PRESTON,
A. FRIZZELL,
Att'ys for Defendant.

13 TERRITORY OF DAKOTA, } ss:
County of Davison, }

R. F. Alterton, being duly sworn, upon oath says that he is the defendant in the above-entitled action; that the foregoing answer is true to his own personal knowledge except as to those matters therein stated upon information and belief, and as to those he believes it to be true.

R. F. ALTERTON.

Subscribed and sworn to before me this 23rd day of January, 1886.

[SEAL.] H. J. MOHR,
Notary Public.

14 TERRITORY OF DAKOTA, }
Second Judicial District. }

In District Court in and for Davison County.

GUSTAVE G. SHAUER }
vs.
R. F. ALTERTON. }

The plaintiff asks the court to give the following instructions to the jury.

A. J. EDGERTON,
A. E. HITCHCOCK.

15 *Instructions Asked by Plaintiff.*

1. It is alleged by the defendant in this action that this transfer was fraudulent and void. Your are expressly instructed that the burden of proving this alleged fraud is upon the defendant and he must do so by a fair preponderance of the evidence. In this connection you are instructed that the law presumes that all persons transact their business honestly and in good faith until the contrary appears from a preponderance of evidence. Fraud will never be imputed when the facts upon which the charge is based are or may be consistent with honesty and purity of intention.

Refused by— BARTLETT TRIPP.

2. If you find in this case that Louis S. Shauer made a sale of these goods to Gustave G. Shauer it will be presumed that such sale was made in good faith and with honest intentions in the absence of proof to the contrary; the jury have no right to question the validity of the sale. If the evidence should be equally balanced, then the defendant must fail as to the fraud alleged.

Given by— BARTLETT TRIPP.

3. If you find from the evidence that the plaintiff knew the insolvency of Louis S. Shauer, and that he was unable to pay his debts, and that the payment of his, the plaintiff's, debt would deprive other creditors of their claims, this mere knowledge on his part would not make the sale in question fraudulent.

Given. BARTLETT TRIPP.

16 4. If the jury believe that the circumstances attending the sale and transfer in this case of the goods and property in question from Louis S. Shauer to Gustave G. Shauer, the plaintiff, are consistent, either with fraudulent intent or with honesty of purpose, then the jury will not be justified in inferring that such transaction was fraudulent. The burden of proof, so far as showing the

purchase of goods in question to be fraudulent, rests upon the defendant; and in order to defeat this action it is incumbent upon the defendant to satisfy you by a clear preponderance of evidence that such transfer was not taken by the plaintiff, Gustave Shauer, for the purpose of obtaining payment of a legal demand which he then held against his brother, Louis S. Shauer.

Refused. BARTLETT TRIPP.

17 5. You are instructed that a debtor in failing circumstances has a right to prefer one creditor to another and to pay or secure one creditor with goods obtained from another on credit, and it makes no difference that such preference will have the effect to defeat the claims of all other creditors. The preference may be given to any lawful demand against the debtor, whether due or not, and whether held by his brother, wife, attorney, or any other person. The secret motives which prompt the preference are immaterial. When the act is right no secret feelings can change its character. One creditor of a failing debtor is not, under the statute, bound to take care of the others. In such a case, if the assets are not sufficient to pay all somebody must suffer. He who has the advantage of preference, whether by the favor of the debtor or his superior vigilance or by both causes combined, is entitled to what he wins if got to satisfy an honest debt.

Refused. BARTLETT TRIPP.

18 6. If it appears to you that Louis S. Shauer was unable to pay his debts; that he owed his brother, Gustave G. Shauer, an honest debt, and that he made a transfer to Gustave G. Shauer of his property to pay such debt, you are instructed, as a matter of law, that he had this privilege, and these attaching creditors cannot question this right.

Though Louis S. Shauer may have purchased these goods transferred by this sale of other creditors on credit, and though after paying his debt to his brother he would not have left one dollar to pay these other creditors, and though both Louis and Gustave Shauer may have known what would be the result of such preference, yet, if an honest debt existed, Louis S. Shauer had this right under the law.

Refused. BARTLETT TRIPP.

19 7. When a creditor purchases of a failing debtor property to satisfy his debt the creditor's property in excess of the indebtedness, if such excess is reasonably necessary for attaining the lawful purpose of satisfying the actual debt, and in payment of such excess the creditor may give either money or his note.

In the alleged sale now in question, if otherwise just and honest, the fact of the plaintiff, Gustave G. Shauer, paying the difference between the debt and the value of the property would in nowise effect the validity of the sale.

Refused by— BARTLETT TRIPP.

8. The mere sale by a party of his stock of goods to a relative is not a badge of fraud. If such sales were fraudulent in themselves it would be impossible for family connections to aid each other in case of financial embarrassment without danger of being placed in a false position and loosing the entire sum loaned. Under this rule, if Louis S. Shauer owed his brother, Gustave G. Shauer, a just debt, he had the same right to transfer his property to his brother in payment of this debt as he would have had to transfer the same property to any one of these attaching creditors in payment of his claim.

Given. BARTLETT TRIPP.

20 9. The acts that will constitute a delivery and change of possession of property sold so as to protect the parties to the transaction as against creditors of the vendor vary in different classes of cases and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case. It is not demanded that the purchaser to take possession of the property — go to an unusual expense and do that which is contrary to the usual course of business. If the purchaser takes that possession which places him in that relation to the property which owners usually are to like kind of property and does all reasonable acts with such property to inform the public of such purchase and if such acts are open, public, and notorious, then such purchaser has done all the law requires him to do.

You are to take into consideration the surrounding circumstances, time the purchaser had been in control of the property, the kind of property, and all those elements making up the conditions of this alleged sale, and if from these circumstances you find that Gustave G. Shauer took possession of the goods in question accompanied with such plain and unmistakable facts of possession, control, and ownership as a prudent *bona fide* purchaser would do in the exercise of his rights over the property so that all persons might have notice that he owned and had possession of the property, then you are instructed that he has done all the law required of him in this particular.

Refused. BARTLETT TRIPP.

21 10. If you find that Gustave Shauer purchased the goods in question from his brother Louis at a fair valuation, and that the consideration for such purchase was in part the payment and satisfaction of a legal demand or claim which Gustave then held against Louis; and, further, that Louis made it one of the conditions of paying and satisfying Gustave's demand that the latter should take goods in excess of the amount of his claim, which condition Gustave in good faith believed that Louis intended to insist upon, then, under these circumstances, the transfer to Gustave is not invalidated by the fact, if such you find was the fact, that he paid the balance in money and his own notes, and this is true notwithstanding you believe that Gustave at the time knew that the purpose of Louis in insisting upon such condition was to enable him to prefer other relatives to whom he was indebted to the exclusion

of his creditors not relatives or even to place such balance beyond the reach of his other creditors.

Refused. BARTLETT TRIPP.

22 *Instructions Asked by the Defendant.*

1. I instruct you that the law does not recognize the filing or recording of a bill of sale in the office of the register of deeds as giving notice to the public of a sale or transfer of the property therein described, and if the bill of sale given by Louis S. Shauer to his brother, Gustave G. Shauer, was filed in the office of the register of deeds of this county I charge you, as a matter of law, that this fact would be no notice to the defendant or these creditors or the public, although they may have discovered it and read it after it was filed in said office.

Refused. BARTLETT TRIPP.

23 2. You are instructed that a conveyance or sale of property made with the intent on the part of the seller to either hinder, delay, or defraud a particular creditor in the collection of his debt is void as against all creditors of the seller if the intent be known to or participated in by the purchaser, although made for a good and valuable consideration.

Given. BARTLETT TRIPP.

24 3. I instruct you that in cases of this kind the law permits a resort to presumptive evidence, for fraud is not easily detected, and the law imputes a fraudulent intent to the debtor when his conduct inevitably leads to the fraud upon his creditors. Where his actions necessarily result in defrauding his creditors, he must be presumed to have foreseen and intended such results.

Refused. BARTLETT TRIPP.

25 4. You are further instructed that actual knowledge by the purchaser of any fraudulent intent on the part of the seller is not essential to render a sale void, and you are instructed, if the facts brought to the attention of Gustave G. Shauer were such to awaken suspicion and lead a man of ordinary prudence to make inquiry, and he fails to make such inquiry, then he is chargeable with notice of fraudulent intent and with participation in the fraud, and it will be your duty to find for the defendant.

Given by— BARTLETT TRIPP.

5. And if you believe from all the evidence that there were such facts as to excite suspicion on the part of G. G. Shauer the law will not permit him to shut his eyes, but he must look about him and inquire. Whatever is notice enough to excite attention and put the party purchasing on his guard and call for inquiry is also notice of everything to which it is afterwards found that such inquiry might have led.

And if you shall believe from all the evidence that Gustave G.

Shauer had sufficient information to lead him to a fact he shall be deemed conversant with it.

Given by— BARTLETT TRIPP.

6. Fraudulent intent is seldom susceptible of deirect proof, but must be established, if at all, by a consideration of all the circumstances of the case, and in this case you are at liberty to consider the relationship, if any, of the parties; the means if any, that Gustave G. Shauer had of knowing of his brother's circumstances, and all the circumstances and facts connected with this alleged purchase and sale.

Refused. BARTLETT TRIPP.

26 7. You are instructed that the change of possession of the property in controversy in this case must not have been merely nominal and momentary; it must have been real, actual, and open, and such as could be publicly known. If the property in controversy was permitted to remain in the possession of Louis S. Shauer, then such transfer was fraudulent in law as to the creditors of Louis S. Shauer, notwithstanding the sale may have been made to his brother in good faith and for a valuable consideration.

Given. BARTLETT TRIPP.

27 8. The jury are instructed, as a matter of law, that any sale of personal property where the possession of the property is permitted by the purchaser to remain in the possession of the seller is fraudulent and void as against the creditors of the seller, and in order to constitute a change of possession of the property in controversy there must have been some outward, open, and visible change in the relation of the parties to the goods that would indicate a change in the possession, that could be seen and known by persons dealing with the goods.

Given by— BARTLETT TRIPP.

9. If you shall believe from all the evidence in this case that at the time of the alleged sale from Louis S. Shauer to Gustave G. Shauer, and that the said Louis S. Shauer had been engaged in business as a retail merchant, and that the goods in question or any part of them were a part of his stock in trade, and that after the alleged sale Louis S. Shauer and his former clerk remained in the charge of the store and selling goods the same as before, and that there was no open, outward, and visible change in the relation of the parties to the goods sufficient to notify the public or customers dealing with the stock that there had been a sale from Louis S. Shauer to Gustave G. Shauer, then I charge you as a matter of law such sale is fraudulent and void as against the creditors of Louis S. Shauer; and if you shall further believe that the said Louis S. Shauer was indebted to Strauss, Goodman, Yorndorf & Company and these other attaching creditors before and at the time of this alleged sale to his brother, then the property so remaining in
28 the possession of Louis S. Shauer could lawfully be taken on attachment writs issued in favor of said creditors and against

the said Louis S. Shauer, and you must return a verdict for the defendant.

Refused by— BARTLETT TRIPP.

10. In order to make this alleged sale and transfer from Louis S. Shauer to Gustave G. Shauer good in law as against the creditors of Louis S. Shauer, it was necessary that there shoul- be an actual change of possession of the property sold from Louis S. Shauer to Gustave G. Shauer, and such sale must have been attended by such outward, open, and notorious signs of actual change of possession as could be seen and known at once to the public and to customers and people dealing with the goods; and if you shall believe that Louis S. Shauer and his clerk, after this alleged sale, still remained in the possession of the store, selling and handling the goods as before, and there were no such outward, visible, open, and notorious signs indicating a change of possession, then in law this transfer was fraudulent and void, and you must return a verdict for the defendant, R. F. Alterton.

Given. BARTLETT TRIPP.

29 GENTLEMEN OF THE JURY: This is an action brought by the plaintiff against the sheriff of this county for conversion of certain personal property alleged to have been wrongfully and unlawfully taken from his possession.

The defendant justifies and says he is the sheriff of this county, and that he took the goods upon sundry warrants of attachments against the property of Louis S. Shauer, and that the property levied on is the property of Louis and not Gustave Shauer, and that the sale of said property under which this plaintiff claims title was fraudulent and void as against the creditors of Louis Shauer, and this is the principal issue which you are to try.

The sheriff in this action takes the place of the creditors of Louis Shauer and is permitted to set up any and every defense that the creditors might or could if they were parties. He is permitted to allege and prove, if he can, that the sale was made by Louis Shauer to his brother, Gustave Shauer, to delay and defraud the creditors of Louis Shauer.

This is not an action to determine whether title passed as between vendor and vendee or seller and purchaser, in which the question of intent and change of possession are of less moment, but it is an action in which the creditor is permitted to show that although as between the parties to the transaction the sale may have been complete and title may have been passed, yet as to him, the creditor, it is fraudulent and void.

It is the policy of the law to protect creditors. They trust the debtor upon the faith of an honest management and disposi-
30 tion of his property. They have, as it were, a *quasi* lien upon the debtor's property for the satisfaction of their indebtedness, and the law scrutinizes carefully all transfers of the failing debtor and zealously guards the rights of the creditors against any fraudulent disposition of the debtor's property.

It is for this reason that transfers to one's wife or to members of his family are carefully scrutinized, experience having taught that such conveyances are more frequently fraudulent than transactions between strangers or those not intimately connected or acquainted; yet experience also teaches that honest and *bona fide* sales and transfers of property are made, and that too much stress or even importance should not be given to such fact alone.

Under our statute every transfer with intent to delay or defraud creditors is void. Section 2023 of the Civil Code reads as follows:

You will perceive that an intent to delay makes the transfer as much void as an intent to defraud or cheat.

Any intent on the part of a debtor to hinder or delay his creditors in the collection of their indebtedness is fraudulent. It is an intent to defraud and, even though there be no immoral intent, to cheat. Creditors are entitled to have their debts paid out of the debtor's property, and any act of his by which the property is placed beyond their reach or they are hindered and delayed in making their debts from the debtor's property is fraudulent in law.

It is true that a debtor in failing circumstances may select whom he will pay and whom he will not pay, but he must do so fairly and honestly.

31 He cannot reserve to himself a secret trust in any transfer. The transaction by which one creditor obtains a portion of the property must be open and fair. The amount of property taken must not be too large or the price paid too small. The creditor must not in seeking to protect himself protect also the debtor, for if he does, although his own claim be a valid and honest one, yet if he tries to also protect or cover the rest of his debtor's property so that it cannot be applied to the payment of his honest debts, then the whole transaction is and becomes tainted with the fraud and the whole transaction is void.

The debt, too, for which the debtor's property is taken in satisfaction must not only be a valid one in part, but as a whole; no part of it must be fictitious, for if the creditor seeks to take the debtor's property upon a debt any material part of which is knowingly fictitious, the whole transaction is thereby tainted with fraud and void as to other creditors.

Therefor- should you find from the evidence that Louis Shauer was fairly and honestly indebted to his brother, Gustvae Shauer, in the full amount cla-med, which I beleive is about $6,700.00, you will remember the exact amount, and that with the honest intention of securing such indebtedness he purchased the property in question without notice or knowledge of any fraudulent intent on the part of Louis Shauer to delay or defraud his creditors and without any intent on his own part to secure any interest in said property, present or future, to his brother Louis, and without any intent to delay or defraud the creditors of Louis Shauer, then he is

32 entitled to recover whatever may have been the intent of Louis Shauer himself, for the intent of Louis Shauer can effect this plaintiff only in case he knew, had notice, or as a prudent

man had knowledge sufficient from the circumstances to put him upon inquiry as to his brother's fraudulent intent.

On the other hand, should you find that the alleged indebtedness from Louis to Gustave Shauer, and which forms a part of the consideration of the sale, was knowingly false and fictitious in whole or a material part, or should you find that the balance of the consideration money or price was paid by Louis to Gustave Shauer with intent to place the same out of and beyond the reach of the creditors of Louis Shauer, or should you find that Gustave Shauer in making the purchase had any intent not only to secure his own indebtedness, but also the further intent to hinder and delay the creditors of Louis Shauer, or any intent to so dispose of the remainder of the property after the satisfaction of his own debt, either that it would be out of the reach of the other creditors or that it would inure in the future to the use and benefit of Louis Shauer, then and in either event the transaction would be tainted with fraud and the plaintiff cannot recover.

What I have said thus far has referred to fraudulent intent as a question of fact, but under certain circumstances and certain conditions of the evidence this fraudulent intent is conclusively proven. Section 2024 of our Code reads as follows:

The statute is an embodiment of the stricter rules of the common law for the protection of creditors from the fraudulent acts of their debtors.

33 It requires an immediate delivery of the property transferred and an actual and continued change of possession, and all sales not so made, while valid as between the parties, are invalid and absolutely void as against creditors.

What is meant by immediate delivery and actual and continued change of possession? These words have many times been construed by the courts, and perhaps I can do no better than to give the exact words of our own supreme court in construing this section. This statute means in the language of our own supreme court:

"That the sale shall be open and public, that the world may be apprized of the change of ownership. The change of possession must be actual and continued and not subject to some secret trust between the seller and buyer."

The delivery must not only be immediate, but the change of possession must be so open and public that the world may be apprized of the change of ownership.

Some of the cases say that the change must be of that character that customers and those accustomed to frequent the premises may be at once advised of the change of possession by the changed appearance of the property or its change of custody.

And this is true whatever may be the good intention or *bona fides* of the transaction; even the law will not tolerate such transfers as against creditors. The change of possession must be open and visible, and if not as against creditors without knowledge of the transfer it will be void, although made for a valuable consideration in good faith and without any actual intent to defraud.

34 In such case the law conclusively presumes a fraudulent intent, and the party to such sale will not be heard to prove the contrary.

Was there an immediate delivery and actual and continued change of possession of this property within the rule I have laid down? The testimony is before you. I do not propose to review it or pass over it in detail. I leave it to you to say whether there was such immediate delivery and actual change of possession of the property in controversy in this case. If there was not it will be your duty to find for the defendant.

Should your verdict be for plaintiff the measure of damage is the value of the property converted at the time of conversion, or where the action has been prosecuted with reasonable diligence, as in this case, the highest market value of the property at any time between the conversion and the verdict at the option of the injured party.

No option having been expressed in this case, if you find for the plaintiff the measure will be the value of the property converted at the time of the conversion, with 7 per cent. interest from the time of the conversion.

You are the sole and exclusive judges of the evidence and the credibility of the witnesses. It is for you to say whom you will believe and whom you will disbelieve. You must be careful not to mistake the statements of the counsel for the evidence given from the witness stand. It is by the evidence as detailed by the witnesses that you are to be governed and upon which you are to base your verdict.

35 You are not to be governed by passion or prejudice in coming to your conclusion upon the facts in this case, nor are you to consider the residence, character, or standing of the parties to this action, except so far as the question of character effects the question of veracity, for in our courts all parties stand alike and are entitled to the same considerations at your hands, whatever their rank, their nationality, their condition in life.

Take this case and determine it upon the facts, and bring in your verdict accordingly.

If you find for the plaintiff your verdict will be:

We, the jury, find for the plaintiff and assess the damages at —— dollars.

If you find for the defendant your verdict will be:

We, the jury, find for the defendant.

36 TERRITORY OF DAKOTA, } *ss*:
Second Judicial District, }

In the District Court in and for Davison County.

GUSTAVE G. SHAUER } Exceptions.
vs.
R. F. ALTERTON. }

Comes now the plaintiff within the time fixed by the court and takes the following exceptions to the refusal of the court to give to

the jury the instructions asked by the plaintiff and to the giving of the instructions asked by the defendant and to the instructions given by the court of its own motion:

1. The plaintiff excepts to the refusal of the court to give the first instruction asked by the plaintiff.

2. The plaintiff excepts to the refusal of the court to *the* the fourth instruction asked by the plaintiff.

3. The plaintiff excepts to the refusal of the court to give the fifth instruction asked by the plaintiff.

4. The plaintiff excepts to the refusal of the court to give the 6th instruction asked by the plaintiff.

5. The plaintiff excepts to the refusal of the court to give the 7th instruction asked by the plaintiff.

6. The plaintiff excepts to the refusal of the court to give the 9th instruction asked by the plaintiff.

7. The plaintiff excepts to the refusal of the court to give the 10th instruction asked by the plaintiff.

8. The plaintiff excepts to the giving of the 2nd instruction asked by the defendant.

37 10. The plaintiff excepts to the giving of the 4th instruction asked by the defendant.

11. The plaintiff excepts to the giving of the 6th instruction asked by the defendant.

12. The plaintiff excepts to the giving of the 7th instruction asked by the defendant.

13. The plaintiff excepts to the giving of the 8th instruction asked by the defendant.

14. The plaintiff excepts to the giving of the 10th instruction asked by the defendant.

15. Plaintiff excepts to that portion of the charge of the court of its own; motion wherein the jury were instructed "that the transfers to one's wife or members of his family are carefully scrutinized, experience having taught that such conveyances are more frequently fraudulent than transactions between strangers or those not intimately acquainted."

16. The plaintiff excepts to the passage of the charge of the court of its own motion as follows: "He (a debtor) cannot reserve to himself a secret trust in any transfer."

17. The plaintiff excepts to that passage in the charge as follows: "The creditor must not in seeking to protect himself protect also the debtor, for if he does, although his own claim be a valid and honest one, yet if he tries also to protect and cover the rest of his debtor's property, so that it cannot be applied to the payment of his honest debts, then the whole transaction is and becomes tainted with fraud, and the whole transaction is void."

18. The plaintiff excepts to that passage of the charge as follows: "Therefor if you find from the evidence that Gustave

38 Shauer * * * purchased the property in question without notice or knowledge of any fraudulent intent on the part of Louis Shauer to delay or defraud his creditors, * * * then

he is entitled to recover whatever may have been the intent of Louis Shauer."

19. The plaintiff excepts to the passage of the charge as follows: "The sale shall be open and public that the world may be apprized of the change of ownership; the change of possession must be actual and continued and not subject to some secret trust between the seller and the buyer."

20. The plaintiff excepts to that passage of the charge as follows: "The delivery must not only be immediate, but the change of possession must be so open and public that the world may be apprized of the change of ownership."

21. The plaintiff excepts to that passage of the charge as follows: "Some of the cases say that the change must be of that character that the customers and those accustomed to frequent the premises may be at once advised of the changed possession by the changed appearance of the property or its change of custody."

The foregoing exceptions are allowed this 5th day of November, 1886.

BARTLETT TRIPP, *Judge.*

39 GUSTAVE G. SHAUER
vs.
R. F. ALTERTON.

We, the jury, find for the defendant, R. F. Alterton.

S. BOWEN, *Foreman.*

40 TERRITORY OF DAKOTA, *Second Judicial District,* } *ss:*

In the District Court in and for Davison County.

GUSTAVE G. SHAUER, Plaintiff,
vs.
R. F. ALTERTON, Defendant.

To Messrs. Dillon and Preston, defendant's attorneys:

Take notice that — the pleadings, verdict, minutes of the court, and all the papers and proceedings in this cause the plaintiff intends to move this court, at the adjourned time thereof to be held at Mitchell, in the county of Davison, D. T., on the 28th day of December, 1886, at the opening of the court on that day *and* as soon thereafter as counsel can be heard, for an order setting aside the verdict rendered in this action and granting a new trial therein upon the following grounds:

1. Insufficiency of evidence to justify said verdict in the following particulars, to wit:

a. That the testimony introduced and received on behalf of plaintiff and uncontradicted showed that plaintiff purchased the goods in controversy prior to the taking by the defendant to cancel a pre-existing indebtedness; that the consideration was in due proportion to the value of the goods; that said purchase was accom-

panied by an immediate delivery and followed by an actual and continued change of possession of the things transferred; that the plaintiff was in the sole possession of said goods at the time the same were taken by the defendant.

41 That prior to the commencement of this action plaintiff demanded, in writing, of the defendant the possession of said goods, and that the value of the said property was in the amount named in plaintiff's complaint.

b. That the defendant introduced no evidence showing that Louis S. Shauer made the transfer of the goods in question to plaintiff with the intent to delay or defraud any creditor of his demand, or that said purchase was made by plaintiff with like intent, or that the plaintiff had knowledge of or participated in any fraudulent intent on the part of the said Louis S. Shauer.

c. That said verdict is against law.

d. That said verdict is against the evidence.

2. Errors in law occurring at the trial and excepted to by the plaintiff as follows:

a. In allowing the defendant to question Louis S. Shauer as to acts and declarations made by him subsequent to the transfer and after the defendant had taken possession of the goods.

b. In allowing the defendant to introduce in evidence what purported to be a transcript of certain records of the criminal court in and for McCook county, State of Illinois, wherein Louis S. Shauer, in the year 1878, was charged with larceny in the amount of two dollars.

c. In allowing the defendant to introduce in evidence a written statement made by Louis S. Shauer on or about Jan'y, 1885, to Bradstreet's Commercial Agency.

42 *d.* In allowing the defendant to introduce the testimony of Edward Twitty and Edward Rose relative to declarations made by said Louis S. Shauer at Chicago on or about September, 1885, at the time certain goods were purchased.

e. In refusing to allow the plaintiff to read in evidence certain portions of the deposition of H. H. Nash, which were in answer to the following questions:

Q. "State whether or not that check (check of $2,100) passed through the Chicago National bank in the ordinary course of business."

And also in refusing to permit the plaintiff to read in evidence certain other parts of the deposition of H. H. Nash, which parts pertained to marks and stamps on the back of checks passing through the Chicago National bank.

f. In charging the jury as follows:

(1.) You are instructed that a conveyance or sale of property made with the intent on the part of the seller either to hinder, delay, or defraud a particular creditor in the collection of his debt is void as against all the creditors of the seller if the intent be known to or participated in by the purchaser, although made for a good and valuable consideration.

(2.) You are further instructed that actual knowledge by the

purchaser of any fraudulent intent on the part of the seller is not essential to render the sale void, and you are instructed if the facts brought to the attention of Gustave G. Shauer were such to awaken suspicion and lead a man of ordinary prudence to make in-
43 quiry and he fails to make such inquiry, then he is charg-a-ble with notice of fraudulent intent and with participation in the fraud, and it will be your duty to find for the defendant.

(3.) Fraudulent intent is seldom susceptible of direct proof, but must be established, if at all, by a consideration of all the circumstances of the case, and in this case you are at liberty to consider the relationship, if any, of the parties; the means, if any, that Gustave G. Shauer had of knowing his brother's circumstances and all the circumstances and facts connected with the alleged purchase and sale.

(4.) You are instructed that the change of possession of the property in controversy in this case must not have been merely nominal and momentary: it must have been real, actual, and open, and such as could be publically known; if the property in controversy was permitted to remain in the possession of Louis S. Shauer, then such transfer was fraudulent in law as to the creditors of Louis S. Shauer, notwithstanding the sale may have been made to his brother in good faith and for a valuable consideration.

(5.) The jury are instructed, as a matter of law, that any sale of personal property where the possession of the property is permitted by the purchaser to remain in the possession of the seller is fraudulent & void as against the creditors of the seller, and in order to constitute a change of possession of the property in controversy there must have been some outward, open, and visible change in the relation of the parties to the goods that would indicate a change in the possession that could be seen and known by persons dealing with the goods.

(6.) In order to make this alleged sale and transfer from
44 Louis S. Shauer to Gustave G. Shauer good in law as against the creditors of Louis S. Shauer it was necessary that there should be an actual change of the possession of the property sold from Louis S. Shauer to Gustave G. Shauer, and such sale must have been attended by such outward, open, and notorious signs of actual change of possession as could be seen and known at once to the public and to customers and persons dealing with the goods; and if you shall believe that Louis S. Shauer and his clerk, after this alleged sale, still remained in the possession of the store, selling and handling the goods as before, and there were no such outward, visible, open, and notorious signs indicating a change of possession, then in law this transfer was fraudulent and void and you must return a verdict for the defendant, R. F. Alterton.

(7.) He (a debtor) cannot reserve to himself a secret trust in any transfer.

(8.) The creditor must not in seeking to protect himself protect also the debtor, for if he does, although his own claim may be a valid and honest one, yet if he tries also to protect and cover the rest of his debtor's property so that it cannot be applied to the payment

of his honest debts, then the whole transaction is and becomes tainted with fraud and the whole transaction is void.

(9.) Therefor- if you find from the evidence that Gustave G. Shauer purchased the property in question without notice or knowledge of any fraudulent intent on the part of Louis Shauer to delay or defraud his creditors, then he *he* is entitled to recover,
45 whatever may have been the intent of Louis Shauer.

(10.) The sale shall be open and public that the world may be apprized of the change of ownership. The change of possession must be actual and continued and not subject to some secret trust between the seller and buyer.

(11.) The delivery must not be only immediate, but the change of possession must be so open and public that the world may be apprized of the change of ownership.

(12.) Some of the cases say that the change must be of such character that customers and those accustomed to frequent the premises may be at once advised of the changed possession by the changed appearance of the property or its change of custody.

In refusing to charge the jury on the request of the plaintiff as follows:

(1.) It is alleged by the defendant in this action that this transfer was fraudulent and void. You are expressly instructed that the burden of proving this alleged fraud is upon the defendant, and he must do so by a fair preponderance of the evidence. In this connection you are instructed that the law presumes that all persons transacts their business honestly and in good faith until the contrary appears from a preponderance of the evidence. Fraud will never be imputed when the facts upon which the charge is based are or may be consistent with honesty and purity of intention.

(2.) If the jury believe that the circumstances attending the sale and transfer in this case of the goods and property in question from Louis Shauer to Gustave Shauer, the plaintiff, are con-
46 sistent either with fraudulent intent or with honesty of purpose, then the jury will not be justified in inferring that such transaction was fraudulent.

The burden of proof, so far as showing the purchase of goods in question to be fraudulent, rests upon the defendant.

And in order to defeat this action it is incumbent upon the defendant to satisfy you by a clear preponderance of evidence that such transfer was not taken by the plaintiff, Gustave Shauer, for the purpose of obtaining payment of a legal demand which he then held against his brother, Louis S. Shauer.

(3.) You are instructed that a debtor in failing circumstances has a right to prefer one creditor to another and to pay and secure one creditor with goods obtained on credit from another creditor, and it makes no difference that such preference will have the effect to defeat the claims of all other creditors. The preference may be given to any lawful demand against the debtor, whether due or not, and whether held by his brother, wife, attorney, or any other person. The secret motives which prompt the preference are imma-

terial. When the act is right no secret feelings can change its character.

One creditor of a failing debtor is not under the statute bound to take care of the others. In such a case if the assets are not sufficient to pay all somebody must suffer. He who has the advantage of preference, whether by the favor of the debtor or of his superior vigilance or by both causes combined, is entitled to what he wins if got to satisfy an honest debt.

(4.) If it appears to you that Louis S. Shauer was unable
47 to pay his debts; that he owed his brother, Gustave G. Shauer, an honest debt, and that he made a transfer to Gustave G. Shauer of his property to pay such debt, you are instructed as a matter of law that he had this privilege, and these attaching creditors cannot question such right.

Though Louis S. Shauer may have purchased these goods transferred by sale of other creditors on credit, and though after paying his debt to his brother he would not have left one dollar to pay these other creditors, and though both Louis and Gustave Shauer may have known what would be the result of such preference, yet if an honest debt existed Louis S. Shauer had this right under the law.

(5.) When a creditor purchases of a failing debtor property to satisfy his debt, the creditor's property in excess of the indebtedness, if such excess is reasonably necessary for attaining the lawful purposes of satisfying the actual debt and in payment of such excess the creditor may give either money or his note.

In the alleged sale now in question, if otherwise just and honest, the fact of the plaintiff, Gustave G. Shauer, paying the difference between the debt and the value of the property would in nowise affect the validity of the sale.

(6.) The acts that will constitute a delivery and change of possession of property sold so as to protect the parties to the transaction as against creditors of the vendor vary in different classes of cases, and will depend very much upon the character and quantity of the property sold as well as the circumstances of each par-
48 ticular case. It is not demanded that the purchaser, to take possession of the property, go to an unusual expense and do that which is contrary to the usual course of business. If the purchaser takes that possession which places him in that relation to the property which owners usually are to the like kind of property, and does all reasonable acts with such property to inform the public of such purchase, and if such acts are open, public, and notorious, then such purchaser has done all the law requires him to do.

You are to take into consideration the surrounding circumstances, time the purchaser had been in control of the property, the kind of property, and all those elements making up the conditions of this alleged sale, and if from these circumstances you find that Gustave G. Shauer took possession of the goods in question, accompanied with such plain and unmistakable facts of possession, control, and ownership as a prudent *bona fide* purchaser would do in the exercise

of his rights over the property, so that all persons might have notice that he owned and had possession of the property, then you are instructed that he has done all the law required of him in this particular.

(7.) If you find that Gustave Shauer purchased the goods in question from his brother Louis at a fair valuation, and that the consideration for such purpose was, in part, the payment and satisfaction of a legal claim or demand which Gustave then held against Louis, and, further, that Louis made it one of the conditions of paying and satisfying Gustave's demand that the latter should take goods in excess of his claim, which condition Gustave in good faith
49 believed that Louis intended to insist upon, then, under the circumstances, the transfer to Gustave is not invalidated by the fact, if such you find was the fact, that he paid the balance in money and his own notes, and this is true notwithstanding you believe that Gustave at the time knew that the purpose of Louis in insisting upon such condition was to enable him to prefer other relatives to whom he was indebted to the exclusion of his creditors not relatives, or even to place such balance beyond the reach of his other creditors.

A. J. EDGERTON,
A. E. HITCHCOCK,
Pl'ff's Att'ys.

50 TERRITORY OF DAKOTA, }
Second Judicial District. }

In the District Court in and for Davison County.

GUSTAVE G. SHAUER }
— } Order.
R. F. ALTERTON. }

An application having been made by the plaintiff herein to set aside the verdict and grant a new trial herein, and the said application coming on for hearing pursuant to said notice, at the court-house, in Mitchell, D. T., the plaintiff being represented by his counsel, A. E. Hitchcock, Esq., and the defendant by Dillon & Preston, and the court having heard the respective counsel and being fully advised in the premises, *and* now, on the motion of Dillon & Preston, attorneys for defendant—

Ordered that the said motion be denied, and that the same is accordingly denied.

Dated Dec. 30th, 1886.

By the court:

BARTLETT TRIPP, *Judge.*

51 TERRITORY OF DAKOTA, } ss:
Second Judicial District, }

In the District Court in and for Davison County.

GUSTAVE G. SHAUER, Plaintiff, }
vs. } Order.
R. F. ALTERTON, Defendant. }

The parties in the above-entitled action having appear-d before me in open court, at the court-house, — city of Mitchell, in Davison county, D. T., on the 15th day of March, 1887, at 10 o'clock a. m., the plaintiff appearing by A. J. Edgerton and A. E. Hitchcock and the defendant by Dillon & Preston, and by stipulation and consent of counsel, it is hereby ordered and adjudged that from the notice of motion for a new trial made by the counsel for the plaintiff, which motion was heard at the court-house, in Mitchell, D. T., on the 28th day of December, 1886, that portion be stricken out consisting of the following words, to wit:

"1. Insufficiency of evidence to justify said verdict, in these the following particulars, to wit:

"*a.* That the testimony introduced and received on behalf of plaintiff, and uncontradicted, showed that plaintiff purchased the goods in controversy prior to the taking by the defendant to cancel a pre-existing indebtedness; that the consideration was in due proportion to the value of the goods; that said purchase was accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred; that the plaintiff was in the sole possessio- of the goods at the time the same were taken by the defendant; that prior to the com-
52 mencement of this action plaintiff demanded, in writing, of the defendant the possession of said goods, and that the value of the said property was in the amount named in plaintiff's complaint.

"*b.* That the defendant introduced no evidence showing that Louis S. Shauer made the transfer of the goods in question to plaintiff with the intent to delay and defraud any creditor of his demand, or that said purchase was made by the plaintiff with a like intent, or that the plaintiff had knowledge of or participated in any fraudulent intent on the part of the said Louis S. Shauer.

"*c.* That said verdict is against law.

"*d.* That said verdict is against the evidence."

By the court:

BARTLETT TRIPP, *Judge.*

M'ch 17th, 1887.

Record.

Filed in the office of the clerk of the district court this 17th day of March, 1887.

JOHN C. McBRIDE, *Clerk.*

53 TERRITORY OF DAKOTA, } ss:
Second Judicial District, }

In the district court in and for Davison county, at an adjourned term of said court held at the court-house, in the city of Mitchell, on the — day of December, 1886.

When present the Hon. Bartlett Tripp and the officers of said court.

GUSTAVE G. SHAUER
—
R. F. ALTERTON. } Judgment.

The above-entitled action having been duly submitted to a jury, and said *cause* having heard the testimony, the argument of counsel, and the instructions of the court, and having duly returned in open court on the 4th day of November, 1886, a verdict for the defendant, and said verdict having been duly entered into the minutes of the court, and the plaintiff's motion for a new trial coming on for hearing, and the court, having considered said motion, does now overrule and deny said motion, and now, on motion of Dillon & Preston, it is considered and ordered that the defendant, R. F. Alterton, recover of and from the plaintiff, Gustave G. Shauer, his costs and disbursements laid out and expended, to be assessed by the clerk upon proper notice, which said costs and disbursements are taxed at the sum of —— dollars.

Done in open court Dec. 31, 1886.

By the court:

BARTLETT TRIPP, *Judge.*

Attest: JOHN C. McBRIDE, *Clerk.*

54 TERRITORY OF DAKOTA, } ss:
Second Judicial District, }

In the District Court in and for Davison County.

GUSTAVE G. SHAUER
vs.
R. F. ALTERTON. } Affidavit of Notice of Taxation of Costs.

Statement of Disbursements and Costs.

Proceedings before notice of trial	$5 00
Proceedings after notice of trial	3 00
Trial fee, issue of fact, first trial	5 00
Trial fee, issue of fact, second trial	5 00
For attending upon and taking deposition on behalf of defendant at Chicago, March, 1886	2 00
For attending upon and taking deposition on behalf of defendant at Sioux City in 1886	2 00
For attending upon and taking deposition on behalf *behalf* of plaintiff at Chicago in March, 1886	2 00
For attending upon and taking deposition on behalf of plaintiff at Chicago, Oct., 1886	2 00
	$26 00

Stella Waterbury, notary fees taking deposition in March, 1886, at Chicago	$6 00		
Edward Twitty, witness fees on taking deposition at Chicago, one day, milage	1 10		
V. C. Sherman, fees taking deposition in October, 1886	5 00		
55 H. A. Covall, fees on deposition at Sioux City, one day, two miles	1 10		
			$13 20

Copy Fees.

Certified copy indictment *vs.* L. S. Shauer and proceedings thereunder	2 50		
Certified copy of tax assessments of property in Chicago	1 50		
			$4 00

Witness Fees.

Edward Pose, milage from Chicago to Mitchell and return, 1,226 miles, and 7 days' attendance (3 miles)	$7 30		
Edward Twitty, milage from Chicago to Mitchell and return, 1,226 miles, and 7 days' attendance (3 mi.)	7 30		
H. A. Coval, milage from St. Paul, Minn., to Mitchell and return, 836 miles, 7 days' attendance (12 mi.)	8 20		
C. H. Austin, milage from Sioux City, Ia., to Mitchell and return, 302 miles, 4 days' attendance (3 mi.)	4 30		
Howard Kibbe, one day's attendance, 2 miles	1 10		
William Hoffman, 3 days' attendance, 2 miles	3 10		
			$31 30

Witness Fees, Second Trial.

Edward Pose, milage from Chicago to Mitchell and return, 1,226 miles, and 11 days' attendance (3 mi.)	$11 30		
Edward Twitty, milage from Chicago to Mitchell and return, 1,226 miles, and 11 days' attendance (3 mi.)	11 30		
Jessie Merrill, milage from Chicago to Mitchell and return, 1,226 miles, and 11 days' attendance (3 mi.)	11 30		
H. A. Covall, milage from St. Paul, Minn., to Mitchell and return, 836 miles, and 11 days' — (12 mi.)	12 20		
C. H. Austin, milage from Sioux City, Iowa, to Mitchell and return, 302 miles, and 11 days' — (3 mi.)	11 30		
Howard Kibbe, one day's attendance and 2 miles	1 10		
			$58 50

56 The said witnesses, Edward Rose, Edward Twitty, Jesse Merrill, each by reason of their attendance as aforesaid traveled the distance of one hundred and sixty miles from the bound-ry line of Dakota to and from Mitchell, and the said C. H. Austin on each of said trials traveled the distance of three hundred miles from the bound-ry lines of Dakota to and from Mitchell, and the said H. A. Covall by reason of his attendance on each trial has traveled the distance of four hundred and fifty miles from the bound-ry line of Dakota to and from Mitchell.

Sheriff's Fees.

Serving subpœna on Hoffman in March, 1886	$ 60	
" " " Louis S. Shauer in Oct., 1886	80	
" " " F. W. Brooks in Nov., 1886	70	
" " " Covell in Oct., 1886	60	
" " " Kibbe and Cross in November, 1886	1 10	
Serving subpœna on Hale, Hitchcock, Foster, Kibbe, Hake, Cross, Wier, Bingham, Owen, and Lee	8 40	
Serving subpœna in Oct., 1886, on Hale Wier, McBride, Owen, Foster, Hitchcock, and Lee	4 10	
		$16 30

Fees Due the County.

Jury fees, first trial	$5 00	
Jury fees, second trial	5 00	
		$10 00

Clerk's Costs, First Trial.

Indexing, docketing, etc.	$3 00	
Calendar	25	
Register	50	
Filing	1 70	
57 Issuing subpœnas	75	
Swearing witnesses	1 60	
Entering orders	1 00	
		$8 80

Clerk's Fees in Second Trial.

Calendar	$ 25	
Register	50	
Filing	1 90	
Subpœna	1 50	
Swearing witnesses	1 60	
Entering judgment	1 00	
		$6 75

Recapitulation.

Allowances for attorneys	$26 00
Costs and disbursements	13 20
Certified copy and copy fees	4 00

Witness fees, first trial	$31 30	
Witness fees for second trial	58 50	
Sheriff's fees	16 30	
County fees	10 00	
Clerk's fees	15 55	
		$174 85

Let above costs in the sum of $174.85 be assessed.

A. E. HITCHCOCK,
Att'y for Plaintiff.

Aug. 13, 1887.

58 TERRITORY OF DAKOTA, } ss:
Second Judicial District, }

In and for Davison County, in District Court.

GUSTAVE G. SHAUER }
vs.
R. F. ALTERTON. }

It is hereby stipulated by the parties to this action that the bill of exception proposed by the plaintiff may be settled without notice before the Hon. Bartlett Tripp, judge, at chamber- at Alexandria, D. T., March 29th, 1887, 2 o'clock p. m.

A. J. EDGERTON,
A. E. HITCHCOCK,
Att'ys for Pl'ff.
DILLON & PRESTON,
Att'ys for Def't.

59 TERRITORY OF DAKOTA, }
Second Judicial District. }

In District Court in and for Davison County.

GUSTAVE G. SHAUER }
vs.
R. F. ALTERTON. }

Bill of Exceptions.

Be it remembered that this cause come on for trial before the Hon. Bartlett Tripp, presiding judge, and a jury at a regular term of said court in and for Davison county, held at the city of Mitchell, on the 26th day of October, 1886, and the following proceedings were then and there had, to wit:

Evidence was adduced on behalf of Gustave G. Shauer, the plaintiff, tending to show that on the 16th day of December, 1885, said Gustave G. Shauer, a druggist engaged in business in the city of Chicago, in the State of Illinois, purchased from his brother, Louis G. Shauer, a merchant doing business at Mitchell, in this Territory, the latter's stock of merchandise, consisting of clothing, furnishing goods, etc., and constituting the goods and chattels in controversy

in this action, for the consideration of $11,382.00, paid as follows: $6,788 by satisfying and discharging an indebtedness of that amount which Louis S. Shauer was then owing to Gustave G. Shauer; $2,100 by the check of Gustave G. Shauer for that sum on the Chicago National bank, which was thereafter duly honored, and the balance, $2,494, by the two notes of Gustave G. Shauer for $1,247, each payable in sixty days and one year respectively.

60 That said purchase come about under the following circumstances: In the month of September, 1885, Louis S. Shauer was indebted to Gustave G. Shauer in an amount of over $3,000 for moneys loaned and advanced since March 10th, 1880. About the first of September, 1885, Louis S. Shauer visited Chicago to make his fall purchases, and while there, upon being informed by Gustave G. Shauer that he, Gustave, contemplated purchasing another drug store, for which he would need a large amount of money, which Louis was then owing him, Louis expressed his expectation of being able soon to pay him one-half of his debt; that Louis, after his return to Mitchell, remitted to Gustave much less money on account of his said debt than Gustave had expected to receive, and Gustave, having written him for more money for the purpose of his contemplated purchase above alluded to and receiving in reply a remittance of only $200, determined to come to Mitchell to see about the matter; that he arrived there on Sunday, the 13th of December, 1885, and from a conversation had with Louis during the evening after his arrival concluded that Louis was financially embarrassed and owed more than he was able to pay; that the following morning he urged Louis to secure him by mortgage on his stock, to which Louis at first consented, but later the same day Louis declined to give a mortgage, and Gustave then proposed that Louis should sell him goods to the amount of his demand, but Louis refused to sell unless Gustave would take his entire stock at fair market price, and after talking the matter over it was finally agreed that Gustave should take Louis' stock at eighty-five cents on the dollar, invoiced at wholesale price, and, after deducting

61 Gustave's demand of $6,788 against Louis, that Gustave should pay $2,100 in cash and the balance in notes; that they commenced taking an inventory that afternoon; that the taking the inventory occupied a day and a half; that the store was open while the inventory was being taken, and that it was taken publically; that Louis executed to Gustave a bill of sale of his stock, including these goods in controversy, at about ten or eleven o'clock in the forenoon of December 16th, 1885.

That after the execution of the bill of sale both parties proceeded to the store in which the goods conveyed were contained, and there Gustave delivered to Louis his check for $2,100 and his two notes for $1,247 each, above mentioned, and surrendered the old note which he held against Louis, and Louis delivered to Gustave the bill of sale and the keys of the store; that the transfer was completed about 12 o'clock.

It also appeared in evidence that immediately after the transfer Gustave opened an account with the First National Bank of Mitchell;

that he went with Louis to an insurance office and had a policy of insurance which Louis carried on the stock transferred, assigned to himself, and then went to dinner; that afternoon they had three other policies of insurance changed from Louis to himself and Gustave returned alone to the store and directed the clerk in the store, who had been in the employment of Louis, to go to dinner, and after he came back informed him that he, Gustave, had bought the store, and he made a contract with said clerk to work for him; that he directed said clerk to change the show in front of the store, which was done; that during the afternoon Gustave re-
62 mained in the store most of the time, waited upon customers, who came to the store to make purchases and personally made some sales; that he prepared and left at the offices of the Mitchell Republican and Mitchell Mail, newspapers printed and published at Mitchell, notices announcing the transfer from Louis to himself and asking for the patronage of the public, which he ordered published, and said notices appeared in the next issue of each of the said newspapers, and he also ordered letter-heads printed; that he ordered a sign for the store with his name on to be painted; that he filed for record in the office of the register of deeds of Davison county, at Mitchell, the aforesaid bill of sale from Louis to himself; that during the afternoon following the transfer to Gustave, Louis S. Shauer on one occasion, at the request of Gustave, came into the store to assist in making the sale of a trunk, with the price of which Gustave was not familiar. Louis was also present at the store in the evening when the defendant made his levy. It further appeared that Louis S. Shauer applied the said check of $2,100 and the two notes of $1,247 each, received by him from Gustave G. Shauer, in payment of demands held against him by several of his relations; that the defendant seized the goods in controversy at about 10 o'clock p. m. on the 16th of December, 1886, the date of the said transfer from Louis to the plaintiff.

The plaintiff also read in evidence the depositions of H. H. Nash, as follows:

Q. "State your name, age, residence, and occupation."

A. My name is Henry H. Nash, Chicago; of lawful age; occupation, cashier of the Chicago National bank.

Q. Are you familiar with the business of the bank?

63 A. Yes, sir.

The plaintiff then offered to read in evidence parts of the deposition of the above-named H. H. Nash relating to three certain checks to the amount of $650.00, $270.87, and $2,100.00, respectively, which checks were in evidence in the case as exhibits and showed upon their faces to have been drawn by G. G. Shauer, plaintiff, upon the Chicago National bank in favor of Louis S. Shauer. The first two checks named, as alleged by the plaintiff, had a tendency to show the payment of money from G. G. Shauer to his brother, Louis S. Shauer, making a part of the indebtedness in question, and the third check of $2,100 was the check which the plaintiff claims to have passed to Louis S. Shauer as a part consideration of the alleged

transfer. On objection of the defendant the court refused, on the ground of being incompetent, to allow the plaintiff to read the answer of the deponent relative to each of the above-named checks in response to the following question:

"You may state whether or not that check has all the appearance of having passed through the bank in the ordinary course of business."

The objection to this question was sustained upon the ground that it appeared in evidence that the check had passed through the other banks than that of which witness was cashier, and it does not appear that the witness was familiar with the course of business of such other banks or their stamp or endorsement thereon, so as to permit him to answer this general question.

The refusal of the court to allow these answers to be read the plaintiff duly excepted.

64 The plaintiff further offered to read in evidence other portions of the depositions of the witness Nash showing what marks and endorsements on the back of each of the said checks indicated, how such marks were made, and by whom. The court refused to allow such parts of the depositions to be read, and to this refusal the plaintiff duly excepted. The objection to this offer was sustained upon the same ground as that last before stated.

It appeared that the deposition was taken in Chicago, at the taking of which both parties appeared by counsel, and that the witness Nash was cross-examined at length by counsel for defendant as to his familiarity with the business of the Chicago National bank, of which he was cashier.

The defendant was allowed under objection by plaintiff, to which ruling the plaintiff duly excepted, to read in*troduce* evidence a confidential business statement of Louis S. Shauer, made in January, 1885, to Bradstreet's Commercial Agency at Sioux City, Iowa. This statement concealed the alleged indebtedness of Louis S. Shauer to his brother, the plaintiff, which existed at that time. It was not shown that this statement was brought to the knowledge of the plaintiff nor to any of the creditors of Louis S. Shauer. All of the indebtedness against Louis S. Shauer, upon which defendant relies, was created at and subsequent to September, 1885.

After the testimony was closed plaintiff's counsel duly requested the judge to give the following instructions to the jury, which the court refused, and to each of which refusals the plaintiff duly excepted.

65 1. It is alleged by the defendants in this action that this transfer was fraudulent and void. You are expressly instructed that the burden of proving this alleged fraud is upon the defendant and he must do so by a fair preponderance of the evidence. In this connection you are instructed that the law presumes that all persons transact their business honestly and in good faith until the contrary appears from a preponderance of the evidence. Fraud will never be imputed when the facts upon which the charge is based are or may be consistent with the honesty and purity of intention.

2. If the jury believe that the circumstances attending the sale and transfer in this case of the goods and property in question from Louis Shauer to Gustave Shauer, the plaintiff, are consistent either with a fraudulent intent or with honesty of purpose, then the jury will not be justified in inferring that such transaction was fraudulent. The burden of proof so far as showing the purchase of goods in question to be fraudulent rests upon the defendant, and in order to defeat this action it is incumbent upon the defendant to satisfy you by a clear preponderance of evidence that such transfer was not taken by the plaintiff, Gustave G. Shauer, for the purpose of obtaining payment of a legal demand which he then hsld against his brother, Louis S. Shauer.

3. You are instructed that a debtor in failing circumstances has a right to prefer one creditor to another and to pay or secure one creditor with goods obtained on credit from another creditor, and it makes no difference that such preference will have the effect to defeat the claim of all other creditors. The preference may be
66 given to any lawful demand against the debtor, whether due or not and whether held by his brother, wife, attorney, or any other person. The secret motives which prompt the preference are immaterial. When the act is right no secret feelings can change its character. One creditor of a failing debtor is not, under the statute, bound to take care of the others. In such case if the assets are not sufficient to pay all, somebody must suffer. He who has the advantage of preference, whether by the favor of the debtor, of his superior vigilance, or by both causes combined, is entitled to what he wins if got to satisfy an honest debt.

4. If it appears to you that Louis S. Shauer was unable to pay his debts, that he owed his brother, Gustave G. Shauer, an honest debt, and that he made a transfer to Gustave G. Shauer of his property to pay such debt, you are instructed, as a matter of law, that he had this privilege, and these attaching creditors cannot question such right. Though Louis S. Shauer may have purchased these goods and transfer-ed by this sale of other creditors on credit, and though after paying his debt to his brother he would not have left one dollar to pay these creditors, and though both Louis and Gustave Shauer may have known what would be the result of such preference, yet, if the honest debt existed, Louis S. Shauer had this right under law.

5. When a creditor purchases of a failing debtor property to satisfy his debt the creditor's property in excess of the indebtedness, if such excess is reasonably necessary for attaining the lawful purpose of satisfying the actual debt and in payment of such excess, the creditor may give either money or his note.
67 In the alleged sale now in question, if otherwise just and honest, the fact of the plaintiff, Gustave G. Shauer, paying the difference between the debt and the value of the property would in nowise affect the validity of the sale.

6. The acts that will constitute a delivery and change of possession of property sold, so as to protect the parties to the transaction as against the creditors of the vendor, vary in different classes of

cases and will depend very much upon the character and quantity of the property sold as well as the circumstances of each particular case. It is not demanded that the purchaser, to take possession of the property, go to an unusual expense and do that which is contrary to the usual course of business. If the purchaser takes that possession which places him in that relation to the property which owners usually are to the like kind of property and does all reasonable acts with such property to inform the public of such purchase, and if such acts are open, public, and notorious, then such purchaser has done all the law requires him to do.

You are to take into consideration the surrounding circumstances, time the purchaser had been in control of the property, the kind of property, and all the elements making up the conditions of this alleged sale, and if from these circumstances you find that Gustave G. Shauer took possession of the goods in question accompanied with such plain and unmistakable acts of possession, control, and ownership as a prudent *bona fide* purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property, then you are instructed that he has done all the law required of him
68 in this particular.

7. If you find that Gustave Shauer purchased the goods in question from his brother Louis at a fair valuation, and that the consideration for such purpose was in part the payment and satisfaction of a legal claim or demand which Gustave then held against Louis, and, further, that Louis made it one of the conditions of paying and satisfying Gustave's demand that the latter should take goods in excess of the amount of his claim, which condition Gustave in good faith believed that Louis intended to insist upon, then, under these circumstances, the transfer to Gustave is not invalidated by the fact, if such you find was the fact, that he paid the balance in money and his own notes, and this is true notwithstanding you believe that Gustave at the time knew that the purpose of Louis in insisting upon such condition was to enable him to prefer other relatives to whom he was indebted to the exclusion of his creditors not relatives, or even to place such balance beyond the reach of his other creditors.

The court, on motion of the plaintiff, gave instructions asked by plaintiff and numbered two (2), three (3), and eight (8) in the original request of plaintiff, which are also made a part of this bill of exceptions.

The court, on motion of the counsel for the defendant, then gave the following instructions to the jury, to the giving of each of which the plaintiff duly excepted :

1. You are instructed that a conveyance or sale of property made with the intent on the part of the seller to either hinder, delay, or defraud a particular creditor in the collection of his debt is void as against all creditors of the seller if the intent be known to or participated in by the purchaser, although made for a good and valuable consideration.

69 2. You are further instructed that actual knowledge by the purchaser of any fraudulent intent on the part of the seller is not essential to render a sale void, and you are instructed if the facts brought to the attention of Gustave G. Shauer were such to waken suspicion and lead a man of ordinary prudence to make inquiry and he fails to make such inquiry, then he is chargeable with notice of fraudulent intent and with participation in the fraud, and it will be your duty to find for the defendants.

3. Fraudulent intent is seldom susceptible of direct proof, but must be established, if at all, by a consideration of all the circumstances in the case, and in this case you are at liberty to consider the relationship, if any, of the parties; the means, if any, that Gustave G. Shauer had of knowing of his brother's circumstances, and all the circumstances and facts connected with this alleged purchase and sale.

4. You are instructed that a change of the property in controversy in this case must not have been merely nominal and momentary. It must have been real, actual, and open, *as* such as could be publically known. If the property in controversy was permitted to remain in the possession of Louis S. Shauer, then such transfer was fraudulent in law as to the creditors of Louis S. Shauer, notwithstanding the sale may have been made to his brother in good faith and for a valuable consideration.

5. The jury are instructed as a matter of law that any sale of personal property, where the possession of the property is permitted by the purchaser to remain in the possession of the seller, is
70 fraudulent and void as against the creditors of the seller, and in order to constitute a change of possession of the property in controversy there must have been some outward, open, and visible change in the relation of the parties to the goods that would indicate a change in possession that could be seen and known by persons dealing with the goods.

6. In order to make this alleged sale and transfer from Louis S. Shauer to Gustave G. Shauer good in law, as against the creditors of Louis S. Shauer, it was necessary that there should be an actual change of possession of the property sold from Louis S. Shauer to Gustave G. Shauer, and such sale must have been attended by such outward, open, and notorious signs of actual change of possession as could be seen and known at once to the public and to customers and people dealing with the goods, and if you shall believe that Louis S. Shauer and his clerk, after this alleged sale, still remained in possession of the store, selling and handling the goods as before, and there were no such outward, visible, open, and notorious signs indicating a change of possession, then in law this transfer was fraudulent and void and you must return a verdict for the defendant, R. F. Alterton.

The court then instructed the jury on its own motion as follows:

GENTLEMEN OF THE JURY: This is an action brought by the plaintiff against the sheriff of the county for conversion of certain per-

sonal property alleged to have been wrongfully and unlawfully taken from his possession.

71 The defendant justifies and says he is the sheriff of this county, and that he took the goods upon sundry warrants of attachments against the property of Louis S. Shauer, and that the property levied upon is the property of Louis and not Gustave Shauer, and that the sale of said property under which this plaintiff claims title was fraudulent and void as against the creditors of Louis S. Shauer, and this is the principal issue which you are to try.

The sheriff in this action takes the place of the creditors of Louis S. Shauer and is permitted to set up any an- every defense that the creditors might or could if they were made parties. He is permitted to allege and prove, if he can, that the sale was made by Louis S. Shauer to his brother, Gustave G. Shauer, to delay or defraud the creditors of Louis S. Shauer.

This is not an action to determine whether title passed as between vendor and vendee or seller and purchaser, in which the question of intent and change of possession are of less moment, but it is an action in which the creditor is permitted to show that, although as between the parties to the transaction the sale may have been complete and the title may have passed, yet, as to him, the creditor, it is fraudulent and void.

It is the policy of the law to protect the creditors. They trust the debtor upon the faith of an honest management and disposition of his property. They have, as it were, a *quasi* lien upon the debtor's property for the satisfaction of their indedtedness, and the law scrutinizes carefully all transfers of the failing debtor and zeal-

72 ously guards the right of the creditors against any fraudulent disposition of the debtor's property.

It is for this reason that transfers to one's wife or to members of his family are carefully scrutinized, experience having taught that such conveyances are more frequently fraudulent than transactions between strangers or those not intimately connected or acquainted. Yet experience also teaches that honest and *bona fide* sales and transfers of property are made, and that too much stress or even importance should not be given to such a fact alone.

Under our statute every transfer with intent to delay or defraud creditors is void. Section 2023 of the Civil Code reads as follows:

You will perceive that an intent to delay makes the transfer as much void as an intent to cheat or defraud. Any intent on the part of a debtor to hinder and delay his creditors in the collection of their indebtedness is fraudulent. It is intent to defraud even though there be no immoral intent to cheat. Creditors are entitled to have their debts paid out of the debtor's property, and any act of his by which the property is placed beyond their reach or they are hindered and delayed in making their debts from the debtor's property is fraudulent in law.

It is true a debtor in failing circumstances and unable to pay all his creditors may select whom he will pay and whom he will not pay, but he must do so fairly and honestly. He cannot reserve to himself a secret trust in any transfer. The transaction by which

one creditor obtains a portion of the property must be open
73 and fair. The amount of property taken must not be too large or the price paid too small. The creditor must not, in seeking to protect himself, protect also the debtor, for if he does, although his own claim may be — valid and honest one, yet if he tries also to protect or cover the rest of his debtor's property so that it cannot be applied to the payment of his honest debts, then the whole transaction is and becomes tainted with the fraud and the whole transaction is void.

The debt, too, for which the debtor's property is taken in satisfaction must not be only a valid one in part, but as a whole no part of it must be fictitious, for if the creditor seeks to take the debtor's property upon a debt any material part of which is knowingly fictitious the whole transaction is thereby tainted with fraud and void as to other creditors.

Therefore, should you find from the evidence that Louis S. Shauer was fairly and honestly indebted to his brother, Gustave Shauer, in the full amount claimed, which I believe is about $6,700, you will remember the exact amount, and that with the honest intention of securing such indebtedness he purchased the property in question without notice or knowledge of any fraudulent intent on the part of Louis S. Shauer to delay or defraud his creditors, and without any intent on his own part to secure any interest in said property, present or future, to his brother Louis, and without any intent to delay or defraud the creditors of Louis S. Shauer, then he is entitled to recover whatever may have been the intent of Louis Shauer himself, for the intent of Louis Shauer can affect the plaintiff only in the
case that he knew, had notice, or as a prudent man had
74 knowledge sufficient from the circumstances to put him upon inquiry as to his brother's fraudulent intent.

On the other hand, should you find that the alleged indebtedness from Louis to Gustave Shauer and which forms a part of the consideration of the sale was knowingly false and fictitious in whole or in a material part, or should you find that the balance of the consideration money or price was paid by Louis to Gustave Shauer with the intent to place the same out of and beyond the reach of the creditors of Louis Shauer, or should you find that Gustave Shauer in making this purchase had any intent not only to secure his own indebtedness, but also the further intent to hinder and delay the creditors of Louis Shauer, or any intent to so dispose of the remainder of the property after the satisfaction of his own debt either that it would be out of the reach of the other creditors or that it would inure in the future to the use and benefit of Louis Shauer, then and in either event the transaction would be tainted with fraud and the plaintiff cannot recover.

What I have said thus far has referred to fraudulent intent as a question of fact, but under certain circumstances and under certain conditions of evidence this fraudulent intent is conclusively proven. Section 2024 of our Code reads as follows:

This statute is an embodiment of the stricter rule of the common law for the protection of creditors from the fraudulent acts of their

debtors. It requires an immediate delivery of the property transfer-ed and an actual and continued change of possession, and all sales not so made, while valid as between the parties, are invalid and absolutely void as against creditors.

75 What is meant by immediate delivery and actual and continued change of possession? These words have been many times construed by the courts, and perhaps I cannot do better than to give you the exact words of our own supreme court in construing this section. This statute means, in the language of our own supreme court—

"That the sale shall be open and public, that the world may be apprized of the change of ownership. The change of possession must be actual and continued and not subject to some secret trust between the buyer and seller."

The delivery must not be only immediate, but the change of possession must be so open and public that the world may be apprized of the change of ownership.

Some of the cases say that the change must be of that character that customers and those accustomed to frequent the premises may be at once advised of the change of possession by the changed appearance of the property or its change of custody.

And this is true, whatever may be the good intention or *bona fides* of the transaction; even the law will not tolerate such transfers as against creditors. The change of possession must be open and visible, and if not, as against creditors without knowledge of the transfer, it will be void though made for a valuable consideration in good faith and without any actual intent to defraud. In such case the law conclusively presumes a fraudulent intent, and the party to such sale will not be heard to prove the contrary.

Was there an immediate delivery and actual and continued change of possession of the property within the rule I have

76 laid down? The testimony is before you. I do not propose to review or pass over it in detail. I leave it to you to say whether there was such immediate delivery and actual change of possession of the property in controversy in this case.

If there was not it will be your duty to find for the defendant.

Should your verdict be for the plaintiff the measure of the damage is the value of the property converted at the time of the conversion, or where the action has been prosecuted with reasonable diligence, as in this case, the highest market value of the property at any time between the conversion and the verdict at the option of the injured party. No option having been expressed in this case, if you find for the plaintiff the measure will be the value of the property converted at the time of the conversion, with seven per cent. interest from the time of the conversion.

You are the sole and conclusive judges of the evidence and the credulity of the witnesses. It is for you to say whom you will believe and whom you will disbelieve. You must be careful not to mistake the statements of the counsel for the evidence given from the witness stand. It is by the evidence as detailed by the wit-

nesses that you are to be governed and upon which you are to base your verdict.

You are not to be governed by passion or prejudice in *in* coming to your conclusion upon the facts in this case, nor are you to consider the residence, character, or standing of the *the* parties in this action, except so far as the question of character affects the question of veracity, for in our courts all parties stand alike and are en-
77 titled to the same consideration at your hands whatever their rank, their nationality, their condition in life.

Take this case and determine it upon the facts and bring in your verdict accordingly.

If you find for the plaintiff your verdict will be:

We, the jury, find for the plaintiff and assess the damages at — dollars.

If you find for the defendant your verdict will be: We, the jury, find for the defendant.

And the plaintiff within the proper time duly excepted to the following portions of said charge, to wit:

1. Wherein the jury was instructed as follows: "That transfers to one's wife or members of his family are carefully scrutinized, experience having taught that such conveyances are more frequently fraudulent than transactions between strangers or those not intimately acquainted."

2. Wherein the jury were instructed as follows: He (a debtor) cannot reserve to himself a secret trust in any transfer."

3. Wherein the jury were instructed as follows: "The creditor must not, in seeking to protect himself, protect also the debtor, for if he does, although his own claim be a valid and honest one, yet, if he tries also to protect and cover the rest of his debtor's property, so that it cannot be applied to the payment of his honest debts, then the whole transaction is and becomes tainted with fraud and the whole transaction is void."

78 4. Wherein the jury were instructed as follows: "Therefore if you find from the evidence that Gustave G. Shauer purchased the property in question without notice or knowledge of any fraudulent intent on the part of Louis Shauer to delay or defraud his creditors, then he is entitled to recover, whatever may have been the intent of Louis Shauer."

5. Wherein the jury were instructed as follows: "The sale shall be open and public, that the world may be apprized of the change of ownership. The change of possession must be actual and continued and not subject to some secret trust between the seller and buyer."

6. Wherein the jury were instructed as follows: "The delivery must not be only immediate, but the change of possession must be so open and public that the world may be apprized of the change of ownership."

7. Wherein the jury were instructed as follows: "Some of the cases say that the change must be of that character that customers and those accustomed to frequent the premises may be at once ad-

vised of the changed possession by the changed appearance of the property or its change of custody."

And thereafter the jury retired for deliberation, and on the — day of ——, 1886, returned a verdict in favor of defendant; to which *the* verdict, contained in the judgment-roll, reference is made.

And afterwards the plaintiff moved the court to set aside said verdict and grant a new trial. Notice of said motion is contained in the judgment-roll, to which reference is made.

79 That afterwards, on the — day of ——, 1886, the court made an order denying and overruling said motion.

To which order plaintiff duly excepted. Said order is contained in the judgment-roll, to which reference is made.

The foregoing bill of exceptions having been presented to me for settlement and allowance, and the application, after due notice to the counsel of the defendant, and the counsel for the defendant having appeared before me, and the court being fully advised—

Said bill of exceptions being found to be correct, the same is hereby allowed, settled, and ordered and filed as a part of the records in this action.

March 29th, 1887.

BARTLETT TRIPP, *Judge.*

80 TERRITORY OF DAKOTA, *Second Judicial District,* } *ss:*

In District Court in and for Davison County.

GUSTAVE G. SHAUER, Plaintiff,
vs.
R. F. ALTERTON, Defendant.

Certificate of Judge.

I, Bartlett Tripp, chief justice of the supreme court of the Territory of Dakota, do hereby certify that the foregoing papers, consisting of the summons, complaint, answer, instructions asked by the plaintiff, instructions asked by the defendant, instructions given by the court on its own motion, exceptions to instructions to the jury, verdict of the jury, notice of motion for a new trial, order denying motion for a new trial, order striking out parts of motion for a new trial, judgment, taxation of costs, bill of exceptions, are contained in and constitute the judgment-roll and the whole of such judgment-roll of the above-entitled action, and that said judgment-roll was filed in the office of the clerk of the district court in and for Davison county on the 21st day of Sept., 1887.

Feb'y 28th, 1889.

BARTLETT TRIPP, *Judge.*

81 *Notice of Appeal from Judgment.*

TERRITORY OF DAKOTA, *Second Judicial District,* } ss:

In the District Court in and for the County of Davison.

GUSTAVE G. SHAUER *vs.* R. F. ALTERTON. } Notice of Appeal from Judgment.

Please take notice that the plaintiff, Gustave G. Shauer, in the above-entitled action, appeals from a judgment entered therein on the 31st day of December, 1886, in favor of the defendant against the plaintiff for dismissal of action and costs, being 174 dollars and 85 cents, to the supreme court of the Territory; and this appeal is taken from the whole of said judgment.

Yours, etc.,

A. E. HITCHCOCK,
Attorney for Gustave G. Shauer.

To Dillon & Preston, attorney- for R. F. Alterton, and John C. McBride, Esq., clerk of the district court of the county of Davison, Dak. T'y.

Service of the within notice of appeal admitted at Mitchell, D. T., this 22nd day of December.

DILLON & PRESTON,
Attorney- for R. F. Alterton, Defendant and Respondent.

Due service of the within notice admitted this 28th day of Dec., 1888.

JOHN C. McBRIDE,
Clerk of District Court, Davison County, Dak. T'y.

82 *Undertaking on Appeal, Supreme Court.*

TERRITORY OF DAKOTA, *Second Judicial District,* } ss:

In the District Court within and for Davison County.

GUSTAVE G. SHAUER *vs.* R. F. ALTERTON. }

Whereas on the thirty-first day of December, 1886, in the district court within and for the county of Davison, the above-named respondent recovered a judgment against the above-named appellant for dismissal of the cause and costs of the action, taxed in the sum of one hundred seventy-four dollars and eighty-five cents;

And the above-named appellant, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal or a dismissal thereof, not exceeding two hundred and fifty dollars, and do also undertake that if the said judgment so appealed from or in any part thereof be affirmed or said appeal be dismissed the said appellant will pay the amount directed to be paid by the said judgment or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on said appeal.

Dated December 21st, 1888.

GUSTAVE G. SHAUER,
By his attorney, A. E. HITCHCOCK.
A. M. BOWDLE.
W. E. RANDALL.

83 TERRITORY OF DAKOTA, } ss:
Davison County, }

On this 21st day of December, A. D. 1888, before me, the subscriber, appeared A. M. Bowdle and W. E. Randall and A. E. Hitchcock, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

I witness whereof I have hereunto set my hand and official seal the day and year above written.

F. A. BIDWELL,
Notary Public, Davison County, Dakota.

TERRITORY OF DAKOTA, } ss:
County of Davison, }

A. M. Bowdle and W. E. Randall, being severally sworn, each for himself says: The said A. M. Bowdle says he is a resident and freeholder of the county of Davison, in this Territory, and that he is worth the sum of $500.00 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution; and the said W. E. Randall for himself says that he is a resident and freeholder of the county of Davison, of this Territory, and that he is worth the sum of $500.00 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

A. M. BOWDLE.
W. E. RANDALL.

Subscribed and sworn to before me this 21st day of December, 1888.

84 F. A. BIDWELL,
[SEAL.] *Notary Public, Dakota.*

Service of the within undertaking admitted at Mitchell, D. T., this 22nd day of December, 1888.

DILLON & PRESTON,
Attorneys for R. F. Alterton, Defendant and Respondent.

85 TERRITORY OF DAKOTA, } ss:
County of Davison, 2nd Judicial District, }

I, John C. McBride, clerk of the district court within and for the said county of Davison, in the 2nd judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the notice of appeal and proof of service thereof, of the judgment-roll, and of the certificate of the judge in the above-entitled action, wherein Gustave G. Shauer is plaintiff and R. F. Alterton is defendant, as the same now remains of record in the said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 18th day of April, A. D. 1889.

[Seal Clerk District Court, Davison County, Dakota.]

JOHN C. McBRIDE, *Clerk.*

86 [Endorsed:] Territory of Dakota, second judicial district. In district court in and for Davison county. Gustave G. Shauer *vs.* R. F. Alterton. Transcript of judgment-roll. 4. Supreme court of the Territory of Dakota. Filed Apr. 20, 1889. J. H. C. Young, clerk. 10 pd.

87 UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In Supreme Court, May Term, A. D. 1889.

Wednesday, May 15th, 1889, being the second day of the term.

Court met at 10 o'clock a. m., pursuant to adjournment, in the supreme court room, in the city of Yankton.

Present:
Bartlett Tripp, chief justice.
James Spencer, associate justice.
Roderick Rose, "
Charles F. Templeton, "
Louis W. Crofoot, "
Frank R. Aikens, "
D. W. Maratta, U. S. marshal.
J. H. C. Young, clerk.

In—

GUSTAVE G. SHAUER, Appellant,
vs.
R. F. ALTERTON, Respondent. } 492.

Notice of motion to dismiss.

* * * * * * *

88 In—

GUSTAVE G. SHAUER, Appellant,
vs.
R. F. ALTERTON, Respondent. } 492.

Motion to dismiss argued.
C. H. Dillon, Esq., for motion; A. E. Hitchcock, Esq., *contra*.

A true record.
Attest: J. H. C. YOUNG, *Clerk*.

UNITED STATES OF AMERICA,
Territory of Dakota, } *ss*:

In Supreme Court, May Term, A. D. 1889.

Friday, May 17th, being the fourth day of the term.

Court met at 10 o'clock a. m., pursuant to adjournment, in the supreme court room, in the city of Yankton.
Present:
Bartlett Tripp, chief justice.
James Spencer, associate justice.
Roderick Rose, "
C. F. Templeton, "
Louis W. Crofoot, "
Frank R. Aikens, "
D. W. Maratta, U. S. marshal.
J. H. C. Young, clerk.

89 In—

GUSTAVE G. SHAUER, Appellant,
vs.
R. F. ALTERTON, Respondent. } 492.

Motion to dismiss denied.

In—

GUSTAVE G. SHAUER, Appellant,
vs.
R. F. ALTERTON, Respondent. } 492.

Argued.
A. E. Hitchcock, for appellant.

A true record.
Attest: J. H. C. YOUNG, *Clerk*.

UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In Supreme Court, May Term, A. D. 1889.

Saturday, May 18th, being the fifth day of the term.

Court met at 10 o'clock a. m., pursuant to adjournment, in the supreme court room, in the city of Yankton.

Present:

Bartlett Tripp, chief justice.
James Spencer, associate justice.
90 Roderick Rose, associate justice.
Charles F. Templeton, "
Louis W. Crofoot, "
Frank R. Aikens, "
D. W. Maratta, U. S. marshal.
J. H. C. Young, clerk.
J. C. Murphy, U. S. attorney.

In—

GUSTAVE G. SHAUER, Appellant,
vs.
R. F. ALTERTON, Respondent. } 492.

Argument resumed.
C. H. Dillon, for respondent.
A. E. Hitchcock replies.
Submitted.

A true record.
Attest: J. H. C. YOUNG, *Clerk.*

91 UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In Supreme Court, May Term, A. D. 1889.

Friday, May 31st, being the sixteenth day of the term.

Court met at 10 o'clock a. m., pursuant to adjournment, in the supreme court room, in the city of Yankton.

Present:

Bartlett Tripp, chief justice.
William B. McConnell, associate justice.
Charles M. Thomas, "
James Spencer, "
Roderick Rose, "
Charles F. Templeton, "
Louis W. Crofoot, "
Frank R. Aikens, "
D. W. Maratta, U. S. marshal.
J. H. C. Young, clerk.
J. C. Murphy, U. S. attorney.

In—

GUSTAVE G. SHAUER, Appellant,
vs.
R. F. ALTERTON, Respondent. } 492.

Held under advisement.

A true record.
Attest: J. H. C. YOUNG, *Clerk.*

92 UNITED STATES OF AMERICA,
Territory of Dakota, } *ss:*

In Supreme Court, October Term, 1889.

Thursday, October 10th, being the ninth day of the term.

Court met at 10 o'clock a. m., pursuant to adjournment, in the supreme court room, in the city of Deadwood.

Present:
Bartlett Tripp, chief justice.
William B. McConnell, associate justice.
Charles M. Thomas, "
James Spencer, "
Roderick Rose, "
Charles F. Templeton, "
Louis W. Crofoot, "
Frank R. Aikens, "
D. W. Maratta, U. S. marshal.
J. H. C. Young, clerk.
J. C. Murphy, U. S. attorney.

In—

GUSTAVE G. SHAUER, Appellant,
vs.
R. F. ALTERTON, Respondent. } 492.

Judgment of affirmance handed down and filed.

A true record.
Attest: J. H. C. YOUNG, clerk.

STATE OF SOUTH DAKOTA,
In Supreme Court, } *ss:*

GUSTAVE G. SHAUER, Plaintiff and Appellant,
vs.
R. F. ALTERTON, Defendant and Respondent.

I, Ivan W. Goodner, clerk of the supreme court in and for the State of South Dakota, hereby certify that the foregoing pages, numbered 1 to 6, inclusive, contain a full, true, and correct copy of all the supreme court journal entries in the above-entitled cause as the same now remain of record in said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this first day of July, A. D. 1890.

[Seal Supreme Court, State of South Dakota.]

IVAN W. GOODNER,
Clerk of the Supreme Court.

93 In the Supreme Court, Territory of Dakota, May Term, 1889.

GUSTAVE G. SHAUER, Plaintiff and Appellant,
vs.
R. F. ALTERTON, Defendant and Respondent. } Motion to Dismiss.

To A. E. Hitchcock, attorney for appellant:

You will please take notice that the respondent, R. F. Alterton, will on Tuesday, the 14th day of May, A. D. 1889, at ten o'clock a. m., or as soon thereafter as counsel can be heard, at the court-house, in the city of Yankton, D. T., move the court to dismiss the appeal taken in the above-entitled action and all proceedings had thereupon, for the following reasons, viz:

First. That the appellant has failed to file with the clerk of the supreme court or in any manner append to the transcript an assignment of errors.

Second. That the appellant has failed to transmit or cause to be transmitted the original papers constituting the judgment appealed from, and has failed to transmit or cause to be transmitted the original notice of appeal or undertaking given therein or any of the original papers constituting the judgment-roll in said action, and has also failed to obtain an order of the court directing copy to be transmitted to the clerk of the supreme court.

Third. That the appeal notice herein was not served on the respondent, R. F. Alterton.

Fourth. That the judgment from which appellant seeks to appeal from was paid and satisfied in full by the appellant Oct. 10th, 1887, and was on the same day discharged and satisfied of record by the respondent. Said motion will be made upon the appeal notice and undertaking given in said appeal, and on the proof of service of said notice and undertaking, all papers filed in the office of the clerk of the supreme court, and on the transcript of said papers and the affidavits hereto annexed, copies of which are hereby served upon you.

Defendant appears especially for the purpose of making this motion, and for no other purpose, and does not by reason of making this motion submit to the jurisdiction of this court.

DILLON & PRESTON,
Att'ys for Resp., R. F. Alterton.

94 In the Supreme Court, Territory of Dakota, May Term, 1889.

GUSTAVE G. SHAUER, Plaintiff and Appellant,
vs.
R. F. ALTERTON, Defendant and Respondent.

TERRITORY OF DAKOTA, } *ss:*
County of Davison, }

John C. McBride, being duly sworn, upon his oath says that at the dates hereinafter mentioned he was and is now the clerk of the district court in and for Davison county, Territory of Dakota; that the judgment in the above-entitled action was filed and docketed on the 3rd day of Jan., 1887; that after the filing and docketing of said judgment on the 10th day of Oct., 1887, the appellant, Gustave G. Shauer, by his attorney, A. E. Hitchcock, paid to affiant, as the clerk of said court, the sum of $176.87, being the full amount of judgment rendered in said cause, together with interest thereon up to the date of such payment for the purpose of satisfying the judgment rendered in said cause; that I thereupon issued to him a receipt showing such payment, a copy of which is hereto attached, marked Ex. "A," and made a part of this affidavit; that on the said 10th day of Oct., 1887, affiant as such clerk paid to Dillon & Preston, attorneys for respondent, the said sum of $176.87 in satisfaction of said judgment, the said Dillon & Preston at said time being attorneys of record for the respondent, R. F. Alterton; that on said day the said firm of Dillon & Preston executed a satisfaction of said judgment and filed the same in the office of the clerk of the district court; that a copy of said satisfaction, together with the filing marks thereon, is hereto attached, marked "Ex. B," and made a part of this affidavit; that said satisfaction piece is now a record in affiant's office, and that thereupon affiant entered upon the records of his said office cancellation and satisfaction of said judgment.

JOHN C. McBRIDE.

Subscribed and sworn to before me this 1st day of May, 1889.
[NOTARIAL SEAL.] W. H. HELWIG,
Notary Public, Dak.

95 Ex. "A."

MITCHELL, DAKOTA.

Received, Monday, Oct. 10th, 1887, of A. E. Hitchcock, Esq, the sum of one hundred seventy-six and eighty-seven hundred- dollars, deposited by him with me to pay the costs taxed in the case of Shauer *vs.* Alterton.

JOHN C. McBRIDE.

Copy.

Ex. "B."

TERRITORY OF DAKOTA, } ss:
Davison County, }

In the District Court within and for the Second Judicial Dist.

GUSTAVE G. SHAUER } Judgment Docketed Jan'y 3rd, 1887.
vs.
R. F. ALTERTON. }

TERRITORY OF DAKOTA, } ss:
County of Davison, }

We, Dillon & Preston, do hereby acknowledge satisfaction of a judgment rendered against Gustave G. Shauer in the district court in and for Davison county, in an action between Gustave G. Shauer, plaintiff, and R. F. Alterton, defendant, and judgment was rendered in favor of R. F. Alterton, defendant, for one hundred and seventy-four and eighty-five hundred- dollars, damages and costs.

Judgment-roll filed and judgment docketed the 31st day of December, one thousand eight hundred and eighty-six, in the clerk's office of the district court in and for said county.

Dated the 10th day of October, 1887.

R. F. ALTERTON,
By DILLON & PRESTON,
Att'ys of Record.

TERRITORY OF DAKOTA, } ss:
Davison County, }

Be it remembered that on this 10th day of October, in the year one thousand eight hundred and eighty-seven, before me, John C. McBride, a clerk — district court within and for said county and Territory, personally appeared C. H. Dillon, a member of the firm of Dillon & Preston, attorneys of record in said cause, well known to me to be the person who execute- the within and foregoing instrument, and severally duly acknowledged to me that he
96 executed the same freely for and on behalf of said firm.

In witness whereof I have hereunto set my hand and official seal, at said county, the day and year above written.

[SEAL.] JOHN C. McBRIDE,
Clerk Dist. Court, Davison County, Dak.

Territory of Dakota, county of Davison. In district court. R. F. Alterton *vs.* G. G. Shauer. Satisfaction of judgment. Judgment docketed Jan. 3rd, 1887. Filed in the office of the clerk of the district court this 10th day of Oct., 1887. John C. McBride, clerk.

(Endorsed on back:) Filed May 15, 1889. J. H. C. Young, clerk.

97 In the Supreme Court, Territory of Dakota.

GUSTAVE G. SHAUER, Appellant,
vs.
R. F. ALTERTON, Respondent.

TERRITORY OF DAKOTA, *County of Davison,* } *ss:*

A. E. Hitchcock, being duly sworn, says that he has been one of the attorneys for Gustave G. Shauer since the commencement of this action; that the facts relating to the satisfaction of judgement in this action, to the best of affiant's recollection, are as follows: That October 10th, 1887, Mr. C. H. Dillon, of the firm of Dillon & Preston, and affiant were present in the office of J. C. McBride, the clerk of the court for Davison county. Mr. Dillon stated to affiant in substance that he wished the costs in this action paid, and that if paid he would satisfy the judgment.

Affiant told Mr. Dillon that he did not wish to pay the judgment, as an appeal would be taken in due time. Mr. Dillon then said if the costs were not paid at once he would institute action against the surety for the amount. Affiant then said he would deposit the amount of the costs with the clerk, which affiant then did. At the time this money was deposited there was some discussion as to its disposal. Affiant insisted that it was not to satisfy the judgment, but merely to secure the costs. The last statement affiant heard from the clerk was that he would consider the matter before doing any-hing with the amount. Nothing further was said in affiant's presence about satisfying the judgment. The execution of the satisfaction of judgment was a voluntary act, and was not at the request or with the knowledge of affiant. It was not till many months subsequent that affiant was aware that the satisfaction of judgment had been filed.

A. E. HITCHCOCK.

Subscribed and sworn to before me this 14th day of May, A. D. 1889.

ARBA U. MARVIN,
Notary Public, Dakota.

[NOTARIAL SEAL.]

98 In the Supreme Court of the Territory of Dakota, May Term, 1889.

GUSTAVE G. SHAUER, Plaintiff and Appellant,
vs.
R. F. ALTERTON, Defendant and Respondent.

Assignment of Errors.

The plaintiff and appellant in the above-entitled cause makes the following assignment of errors as the cause of his appeal herein:

At the trial in the lower court the court erred in the following particulars:

1st. In refusing to allow the plaintiff to read in evidence the deposition of H. H. Nash.

Tr., p. 18.

2nd. In overruling the plaintiff's objection to the introduction as evidence by the defendant of the written statement made by Louis S. Shauer to Bradstreet's Commercial Agency in January, 1885.

Tr., p. 20.

3d. In refusing to instruct the jury as requested by the plaintiff in instruction number one.

Tr., p. 21.

4th. In refusing to instruct the jury as requested by the plaintiff in instruction number two.

Tr., p. 21.

5th. In refusing to instruct the jury as requested by the plaintiff in instruction number three.

Tr., p. 21.

6th. In refusing to instruct the jury as requested by the plaintiff in instruction number four.

Tr., p. 22.

7th. In refusing to instruct the jury as requested by the plaintiff in instruction number five.

Tr., p. 22.

8th. In refusing to instruct the jury as requested by the plaintiff in instruction number six.

Tr., p. 23.

9th. In refusing to instruct the jury as requested by the plaintiff in instruction number seven.

Tr., p. 23.

10th. In giving to the jury, upon the request of the defendant, instruction number one.

Tr., p. 24.

11th. In giving to the jury, upon the request of the defendant, instruction number two.

99 Tr., p. 25.

12th. In giving to the jury, upon the request of the defendant, instruction number three.

Tr., p. 25.

13th. In giving to the jury, upon the request of the defendant, instruction number four.

Tr., p. 25.

14th. In giving to the jury, upon the request of the defendant, instruction number five.
Tr., p. 25.

15th. In giving to the jury, upon the request of the defendant, instruction number six.
Tr., p. 26.

16th. In instructing the jury that transfers to one's wife or member of his family are carefully scrutinized, experience having taught that such conveyances are more frequently fraudulent than transactions between strangers or those not intimately connected.
Tr., p. 28.

17th. In instructing the jury that he (a debtor) cannot reserve to himself a secret trust in any transfer.
Tr., p. 28.

18th. In instructing the jury that the creditor must not, in seeking to protect himself, protect also the debtor, for if he does, although his own claim be a valid and honest one, yet if he tries also to protect and cover the rest of his debtor's property so that it cannot be applied to the payment of his honest debts, then the whole transaction is and becomes tainted with fraud and the whole transaction is void.
Tr., p. 29.

19th. In instructing the jury that therefore if you find from the evidence that Gustave Shauer purchased the property in question without notice or knowledge of any fraudulent intent on the part of Louis Shauer to delay or defraud his creditors, then he is entitled to recover whatever may have been the intent of Louis Shauer.
Tr., p. 29.

20th. In instructing the jury that the sale shall be open and public, that the world may be apprised of the change of ownership. The change of possession must be actual and continued and not subject to some secret trust between the seller and buyer.
Tr., p. 31.

21st. In instructing the jury that the delivery must not only be immediate, but the change of possession must be so open and public that the world may be apprised of the change of ownership.
Tr., p. 31.

22nd. In instructing the jury that some cases say that the change must be of that character that customers and those accustomed to frequent the premises may be at once advised of the changed possession by the changed appearance of the property or its change of custody.
Tr., p. 31.

23d. In overruling and denying plaintiff's motion for a new trial.

Tr., p. 49.

100 24th. In rendering judgment in favor of the defendant and against the plaintiff.

Tr., p. 50.

A. B. BALDWIN AND
A. E. HITCHCOCK,
Attorneys for Appellant.

(Endorsed on back:) In the supreme court, Dakota Territory, May term, 1889. Gustave G. Shauer, appellant, *vs.* R. F. Alterton, respondent. Assignment of errors by appellant. Supreme court of the Territory of Dakota. Filed May 10, 1889. J. H. C. Young, clerk. A. B. Baldwin, A. E. Hitchcock, appellant's att'ys.

STATE OF SOUTH DAKOTA, *ss:*

In Supreme Court.

GUSTAVE G. SHAUER, Plaintiff and Appellant,
vs.
R. F. ALTERTON, Defendant and Respondent.

I, Ivan W. Goodner, clerk of the supreme court in and for the State of South Dakota, hereby certify that the foregoing is a full, true, and correct copy of the assignment of errors in the above-entitled cause as the same now remains of record in said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this first day of July, A. D. 1890.

[Seal Supreme Court, State of South Dakota.]

IVAN W. GOODNER,
Clerk of the Supreme Court.

101 THE UNITED STATES OF AMERICA,
Territory of Dakota, } *ss:*

In the Supreme Court.

Appeal from the district court of Davison county.

GUSTAVE G. SHAUER, Plaintiff and Appellant,
vs.
R. F. ALTERTON, Defendant and Respondent. } May Term, A. D. 1889.

This action coming on to be heard at the May, 1889, term of this court, at the supreme court room, in the city of Yankton, Territory of Dakota—present, Bartlett Tripp, chief justice, and William B. McConnell, Charles M. Thomas, James Spencer, Roderick Rose, Charles F. Templeton, Louis W. Crofoot, and Frank R. Aikens, associate jus-

tices—and the appeal herein having been argued by A. E. Hitchcock, Esq., for the appellant, and by C. H. Dillon, Esq., for respondent, and the court desiring to advise thereon, it is now here ordered that the said cause from the said district court within and for said Davison county, appealed from herein, be, and the same is hereby, held under advisement.

By the court:

BARTLETT TRIPP,
Chief Justice.

Filed in open court this 31 day of May, 1889.

J. H. C. YOUNG, *Clerk.*

STATE OF SOUTH DAKOTA, *In Supreme Court,* } ss:

GUSTAVE G. SHAUER, Plaintiff and Appellant,
vs.
R. F. ALTERTON, Defendant and Respondent.

I, Ivan W. Goodner, clerk of the supreme court in and for the State of South Dakota, hereby certify that the foregoing is a full, true, and correct copy of the order of supreme court filed May 31, 1889, in the above-entitled cause, as the same now remains of record in said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this first day of July, A. D. 1890.

[Seal Supreme Court, State of South Dakota.]

IVAN W. GOODNER,
Clerk of the Supreme Court.

101½ THE UNITED STATES OF AMERICA, *Territory of Dakota,* } ss:

In the Supreme Court.

Appeal from the district court of Davison county.

GUSTAVE G. SHAUER, Plaintiff and Appellant,
vs.
R. F. ALTERTON, Defendant and Respondent.
} October Term, A. D. 1889.

This action coming on to be heard at the May, A. D. 1889, term of this court, at the supreme court room, in the city of Yankton, Territory of Dakota—present, Bartlett Tripp, chief justice, and William B. McConnell, Charles M. Thomas, James Spencer, Roderick Rose, Charles F. Templeton, Louis W. Crofoot, and Frank R. Aikens, associate justices—and the appeal herein having been argued by A. E. Hitchcock, Esq., for the appellant, and by C. H. Dillon, Esq., for respondent, and taken under advisement, and the court having advised thereon, it is now here considered, ordered, and adjudged that

the judgment of the said district court within and for said Davison county, appealed from herein, be, and the same is hereby, in all things affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that the respondent have and recover of the appellant his costs and disbursements on this appeal expended, taxed and allowed at —.

By the court:

BARTLETT TRIPP,
Chief Justice.

All the justices concur, the chief justice not sitting.

(Endorsed on back:) In supreme court, Territory of Dakota. October term, 1889. Gustave G. Shauer, plaintiff and appellant, *vs.* R. F. Alterton, defendant and respondent. Filed in open court this 10th day of October, 1889. J. H. C. Young, clerk.

STATE OF SOUTH DAKOTA, } *ss:*
In Supreme Court, }

GUSTAVE G. SHAUER, Plaintiff and Appellant, }
vs.
R. F. ALTERTON, Defendant and Respondent. }

I, Ivan W. Goodner, clerk of the supreme court in and for the State of South Dakota, hereby certify that the foregoing is a full, true, and correct copy of the order of supreme court filed Octo. 10, 1889, in the above-entitled cause, as the same now remains of record in said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this first day of July, A. D. 1890.

[Seal Supreme Court, State of South Dakota.]

IVAN W. GOODNER,
Clerk of the Supreme Court.

102 Know all men by these presents that we, Gustave G. Shauer and Stephen V. Brundage and Alex. M. Bowdle, are held and firmly bound unto R. F. Alterton in the full and just sum of one thousand dollars, to be paid to the said R. F. Alterton, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of April, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of the supreme court in and for the Territory of Dakota, held at the city of Deadwood October, 1889, in a suit depending in said court between Gustave G. Shauer, plaintiff and appellant, and R. F. Alterton, defendant and respondent, a

judgment was rendered against the said Gustave G. Shauer, and the said Gustave G. Shauer having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said R. F. Alterton, citing and admonishing him to be and appear *and* a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Gustave G. Shauer shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GUSTAVE G. SHAUER. [SEAL.]
STEPHEN V. BRUNDAGE. [SEAL.]
ALEX. M. BOWDLE. [SEAL.]

Sealed and delivered in the presence of—
—— ——.

Approved by—
DIGHTON CORSON,
Presiding Judge of S. C., State of South Dakota.

I consider the above bond good for the penalty of the same.
M. H. BRADLEY,
Clerk U. S. Cir. Court, N. Dist. of Ills.

Supreme court, State of South Dakota. Filed Apr. 30, 1890. Ivan W. Goodner, clerk.

STATE OF SOUTH DAKOTA, } ss:
In Supreme Court, }

GUSTAVE G. SHAUER, Plaintiff and Appellant,
vs.
R. F. ALTERTON, Defendant and Respondent.

I, Ivan W. Goodner, clerk of the supreme court in and for the State of South Dakota, hereby certify that the foregoing is a full, true, and correct copy of the bond for security in error in the above-entitled cause as the same now remains of record in said supreme court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this first day of July, A. D. 1890.

[Seal Supreme Court, State of South Dakota.]

IVAN W. GOODNER,
Clerk of the Supreme Court.

103 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of South Dakota, as successor of the supreme court of the Territory of Dakota in the matters hereinafter named, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, between Gustave G. Shauer, plaintiff, and R. F. Alterton, defendant, a manifest error hath happened, to the great damage of the said Gustave G. Shauer, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Supreme Court, State of South Dakota.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the — day of April, in the year of our Lord one thousand eight hundred and ninety.

IVAN W. GOODNER,
Clerk of the Supreme Court of the State of South Dakota.

Allowed by—
DIGHTON CORSON,
Presiding Judge of the Supreme Court, South Dakota.

[Endorsed:] Supreme court, State of South Dakota. Filed Apr. 30, 1890. I. W. Goodner, clerk.

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States to R. F. Alterton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Dakota, as successor to the supreme court of the Territory of Dakota, wherein Gustave G. Shauer is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Dighton Corson, presiding judge of the

supreme court of the State of South Dakota, this 30th day of April, in the year of our Lord one thousand eight hundred and ninety.

DIGHTON CORSON,
Presiding Judge of Supreme Court, State of South Dakota.

105 [Endorsed:] Supreme court, State of South Dakota. Filed May 29, 1890. Ivan W. Goodner, clerk.

On this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and ninety, personally appeared A. E. Hitchcock before me, the subscriber, a notary public for the State of South Dakota, and makes oath that he delivered a true copy of the within citation to C. H. Dillon, Esq., a member of the law firm of Dillon and Preston, who are attorneys of record for within-named defendant, R. F. Alterton, at the city of Mitchell, State of South Dakota, May 3rd, 1890.

A. E. HITCHCOCK.

Sworn to and subscribed the 26th of May, A. D. 1890.

[Seal of A. B. Hager, Notary Public, South Dakota.]

A. B. HAGER,
Notary Public, State of South Dakota.

106 Supreme Court, State of South Dakota.

GUSTAVE G. SHAUER, Plaintiff and Appellant,
vs.
R. F. ALTERTON, Defendant and Respondent.

STATE OF SOUTH DAKOTA,
County of Hughes, } *ss:*

I, Ivan W. Goodner, clerk of the supreme court of the State of South Dakota, do hereby certify that the papers hereto attached, and of which this certificate forms a part, contain the original writ of error, citation, a certified copy of the bond for security in error, and a true and correct transcript of all the supreme court journal entries of record and of all the proceedings in the case above entitled; and I further certify that the records of my office show that the supreme court of the Territory of Dakota rendered no opinion in the case other than a formal judgment affirming the judgment of the lower court, a copy of which judgment is herein contained as a part of this record.

Seal Supreme Court, State of South Dakota.

Given under my hand and seal of office, at Pierre, State of South Dakota, on the 1st day of July, in the year of our Lord one thousand eight hundred and ninety.

IVAN W. GOODNER, *Clerk.*

[Endorsed:] Gustave G. Shauer, app'l't, *vs.* R. F. Alterton, resp't.

Endorsed on cover: Case No. 14,140. South Dakota supreme court. No. 174. Gustave G. Shauer, plaintiff in error, *vs.* R. F. Alterton. Filed September 9, 1890.

CASE No. 14,140.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 174.

GUSTAV G. SHAUER, PLAINTIFF IN ERROR,

vs.

R. F. ALTERTON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

Now comes the plaintiff in error in the above-entitled cause, by his attorney, and moves the court for leave to assign errors upon the record in said cause, a copy of the proposed assignment of errors being hereto attached, and for reason of said motion says that said cause was in charge of A. B. Baldwin, Esq., counsel for said plaintiff in error; that since filing of said record said A. B. Baldwin, Esq., has deceased; that upon securing other counsel to attend to said cause herein it was discovered that said A. B. Baldwin, Esq., had omitted to assign errors upon the record as required by the statute and rules of this court; that imme-

diately upon discovering said omission plaintiff in error, by his counsel, prepared the assignment of errors hereto attached, and notice to defendant in error in South Dakota, September 23, 1893, and upon the attorney of record herein, M. H. Beach, Esq., on the 10th day of October, 1893; that said causes will not probably be reached for argument for some months, and no briefs have been filed herein; that an assignment of errors is necessary to a fair and full argument and hearing of said cause in this honorable court. Plaintiff in error therefore prays that this motion be granted with leave to have the assignment of errors printed.

HENRY W. MAGEE,
Attorney for Plaintiff in Error.

A. D. ADKINSON.
CHAS. W. NEEDHAM.
JOHN B. COTTON.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

GUSTAV G. SHAUER, *Plaintiff in Error,*
vs.
R. F. ALTERTON, *Defendant in Error.*

To DILLON AND PRESTON, Esqs., *Attorneys for the Defendant in Error:*

You will please to take notice that on Monday, the 16th day of October, A. D. 1893, or as soon thereafter as counsel can be heard, we shall ask the Court to enter an order granting leave to the said plaintiff in error to assign errors upon the record in the above-entitled case, a copy of which errors to be assigned is herewith annexed and made a part of this notice.

HENRY W. MAGEE,
Attorney for Plaintiff in Error.

A. E. HITCHCOCK.
E. W. ADKINSON.
Of Counsel.

STATE OF SOUTH DAKOTA, } ss:
County of Davison, }

John W. Powers, being duly sworn, upon his oath deposes and says that he served a copy of the above notice and assignment of errors upon H. C. Preston, Esq., one of the members of the firm of Dillon & Preston, the attorney for the said defendant in error, on the 23d day of September, A. D. 1893.

JOHN W. POWERS.

Subscribed and sworn to before me this 23d day of September, 1893.

[SEAL.] H. R. KIBBEE,
Notary Public, South Dakota.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

GUSTAV G. SHAUER, *Plaintiff in Error,* }
vs.
R. F. ALTERTON, *Defendant in Error.* }

To M. H. BEACH, Esq., *Attorney for the Defendant in Error:*

You will please to take notice that on Monday, the 16th day of October, A. D. 1893, or as soon thereafter as counsel can be heard, we shall ask the Court to enter an order granting leave to the said plaintiff in error to assign errors upon the record in the above-entitled case, a copy of which errors to be assigned is herewith annexed and made a part of this notice.

HENRY W. MAGEE,
Attorney for Plaintiff in Error.

A. E. HITCHCOCK,
E. W. ADKINSON,
NEEDHAM & COTTON,
Of Counsel.

I hereby accept service of the above notice and copy of assignment of errors this 10th day of October, 1893.

MORGAN H. BEACH,
Attorney for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

GUSTAV G. SHAUER, *Plaintiff in Error,*
vs.
R. F. ALTERTON, *Defendant in Error.*

And now comes the said plaintiff in error, by his attorney, Henry W. Magee, and says that there is manifest error in the record of the foregoing proceedings in the district court in and for the county of Davison and in the supreme court of the State of South Dakota, as the successor of the supreme court of the Territory of Dakota, in this:

(1.) That the supreme court erred in affirming the ruling of the said district court in refusing to allow the plaintiff in error to read in evidence the deposition to H. H. Nash.

Record, pages 29 and 30.

(2.) That the supreme court erred in affirming the ruling of said district court in overruling the objection of the plaintiff in error to the introduction as evidence by the defendant in error of the written statement made by Louis S. Shauer to Bradstreet's commercial agency in January, 1885.

Record, page 30.

(3.) That the supreme court erred in affirming the ruling of the said district court in refusing to instruct the jury as requested by the plaintiff in error in instruction number one.

Record, page 30.

(4.) That the supreme court erred in affirming the ruling of the said district court in refusing to instruct the jury as requested by the plaintiff in error in instruction number two.

Record, page 31.

(5.) That the supreme court erred in affirming the ruling of said district court in refusing to instruct the jury as requested by the plaintiff in error in instruction number three.

Record, page 31.

(6.) That the supreme court erred in affirming the ruling of said district court in refusing to instruct the jury as requested by the plaintiff in error in instruction number four.

Record, page 31.

(7.) That the supreme court erred in affirming the ruling of the district court in refusing to instruct the jury as requested by the plaintiff in error in instruction number five.

Record, page 31.

(8.) That the supreme court erred in affirming the ruling of the said district court in refusing to instruct the jury as requested by the plaintiff in error in instruction number six.

Record, page 31.

(9.) That the supreme court erred in affirming the ruling of the said district court in refusing to instruct the jury as requested by the plaintiff in error in instruction number seven.

Record, page 82.

(10.) That the supreme court erred in affirming the ruling of the said district court in giving to the jury, upon the request of the defendant in error, instruction number one.

Record, page 32.

(11.) That the supreme court erred in affirming the ruling of the said district court in giving to the jury, upon the request of the defendant in error, instruction number two.

Record, page 33.

(12.) That the supreme court erred in affirming the ruling of the said district court in giving to the jury, upon the request of the defendant in error, instruction number three.

Record, page 33.

(13.) That the supreme court erred in affirming the ruling of the said district court in giving to the jury, upon the request of the defendant in error, instruction number four.

Record, page 33.

(14.) That the supreme court erred in affirming the ruling of the said district court in giving to the jury, upon the request of the defendant in error, instruction number five.

Record, page 33.

(15.) That the supreme court erred in affirming the ruling of the said district court in giving to the jury, upon the request of the defendant in error, instruction number six.

Record, page 33.

(16.) That the supreme court erred in affirming the ruling of the said district court in instructing the jury that transfers to one's wife or member of his family are carefully scrutinized, experience having taught that such conveyances are more frequently fraudulent than transactions between strangers or those not intimately acquainted.

Record, page 34.

(17.) That the supreme court erred in affirming the ruling of the said district court in instructing the jury that he (a debtor) cannot reserve to himself a secret trust in any transfer.

Record, page 34.

(18.) That the supreme court erred in affirming the ruling of the said district court in instructing the jury that the creditor must not, in seeking to protect himself, protect also the debtor, for if he does, although his own claim be a valid and honest one, yet if he tries also to protect and cover the rest of his debtor's property so that it cannot be applied to the payment of his honest debts, then the whole transaction is and becomes tainted with fraud and the whole transaction is void.

Record, page 35.

(19.) That the supreme court erred in affirming the ruling of the said district court in instructing the jury that therefore if you find from the evidence that Gustav Shauer purchased the property in question without notice or knowledge of any fraudulent intent on the part of Louis Shauer to defraud or delay his creditors, then he is entitled to recover whatever may have been the intent of Louis Shauer.

Record, page 35.

(20.) That the supreme court erred in affirming the ruling of said district court in instructing the jury that the sale shall be open and public, that the world may be apprised of the change of ownership. The change of possession must be actual and continued and not subject to some secret trust between the seller and buyer.

Record, page 36.

(21.) That the supreme court erred in affirming the ruling of the said district court by instructing the jury that the delivery must not only be immediate but the change of possession must be so open and public that the world may be apprised of the change of ownership.

Record, page 36.

(22.) That the supreme court erred in affirming the ruling of the said district court in instructing the jury that some cases say that the change must be of that character that customers and those accustomed to frequent the premises may be at once advised of the change of possession by the changed appearance of the property or its change of custody.

Record, page 36.

(23.) That the supreme court erred in affirming the ruling of the said district court in overruling and denying the motion of the plaintiff in error for a new trial.

Record, page 38.

(24.) That the supreme court erred in affirming the ruling of the said district court in rendering judgment in favor of the defendant in error and against the said plaintiff in error.

Record, page 20.

(25.) That the supreme court erred in not reversing the judgment of the said district court of Davison county.

Wherefore plaintiff in error prays that said errors may be considered by this Court, and that judgment and order of said case in the supreme court of the State of South Dakota may be reversed and said case remanded.

HENRY W. MAGEE,
Attorney for Plaintiff in Error.

A. E. HITCHCOCK,
E. W. ADKINSON,
Of Counsel.

Office Supreme Court U. S.
FILED.
NOV 6 1893
JAMES. H. McKENNEY.
CLERK.

TERM NO. 174. RECORD CASE NO. 14,140.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

GUSTAVE G. SHAUER,
Plaintiff in Error.

vs.

R. T. ALTERTON,
Defendant in Error.

In Error to the Supreme Court of South Dakota.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR

HENRY W. MAGEE,
ATTORNEY FOR PLAINTIFF IN ERROR.

A. E. HITCHCOCK,
E. W. ADKINSON,
OF COUNSEL.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

Term No. 174.

GUSTAVE G. SHAUER,
Plaintiff in Error.
vs.
R. T. ALLERTON.
Defendant in Error.

In Error to the Supreme Court of South Dakota Succeeding to the Supreme Court of the Territory of Dakota.

STATEMENT OF THE CASE.

This is a writ of error to the Supreme Court of South Dakota, as the successor of the Supreme Court of the Territory of Dakota.

The action is for conversion, brought by one Gustave G. Shauer, Plaintiff in Error herein, against R. T. Allerton, Defendant in Error to recover the value of a certain stock of merchandise, consisting principally of Clothing.

The plaintiff claims ownership to these goods by virtue of a purchase from his brother, one Louis S. Shauer, who had been conducting a clothing store for a number of years in the City of Mitchell, Dakota, where the goods were situated at the time of the alleged conversion.

The defendant was Sheriff of Davidson County, and levied upon the property under certain writs of attachments issued by certain creditors of Louis S. Shauer.

The defendant justifies under these attachment proceedings and alleges that the sale by Louis S. Shauer to his brother Gustave was fraudulent and void as to the creditors of Louis S. Shauer. It is alleged that the fraud upon which defendant relies was actual and constructive; actual, in that the sale was made with the intent of the parties to defraud the creditors of Louis S. Shauer; constructive; in that at the time of the levy there had not been such a change of possession of the goods as the law demands.

The evidence submitted at the trial tends to show that at the time of this sale, which occurred December 16th, 1885, Louis S. Shauer was indebted to the plaintiff for money which had been borrowed during a period of four or five years immediately preceeding the date of transfer, and that there was a balance due the plaintiff of $6,733.00; that the consideration of the transfer was the cancellation of this indebtedness, the payment of $2,100.00 by a check drawn upon a bank of Chicago where the plaintiff had an account, and the execution and delivery of two notes of $1,247.00 each, due in sixty days and one year respectively; that the excess of the consideration over and above the indebtedness referred to was applied by Louis S. Shauer to the satisfaction of other demands held against him; that the transfer was made for the sole object of satisfying this indebtedness to the plaintiff and was in the nature of a preference of plaintiff over other creditors; that the debtor insisted on the plaintiff purchasing the entire stock at a fair valuation if he desired a preference, and that the entire stock was taken only after the debtor refused to mortgage or sell a portion thereof to satisfy plaintiff's claim; that the parties to the transfer made an invoice of the

stock during the two days preceeding the sale, which invoice was open and public, and the agreed price at which plaintiff took the goods was eighty-five cents on the dollar, at wholesale price, the gross amount of the stock at this rate being $11,382.00; that the details of the transfer and change of possession were as follows; the invoice and price of the goods were agreed upon about noon of December 16, 1885; the parties then employed an attorney to draw a contract or bill of sale which was signed and delivered to platntiff; the plaintiff passed the notes and check to the debtor, Louis S. Shauer, and a settlement of account was had between them; the keys of the store building were delivered to plaintiff, plaintiff went to three different insurance agents and effected the transfer of insurance policies from the former debtor to himself; he wrote two notices of the transfer in the form of advertisements, wherein he sought the patronage of the public, and delivered one to each of the two newspapers published in Mitchell, which notices were published in first issue of these papers; he ordered a sign with his name upon it, to be painted and placed over the place of business; he opened an account with the First National Bank of Mitchell and made a deposit; he filed the bill of sale with the Register of Deeds of Davidson County, the County being the one in which the goods were situated; he informed the former Clerk of Louis S. Shauer of his purchase and made a contract for continuing the employment and fixing the salary; he directed such clerk to perform certain acts connected with the management of the store, one of which was to make a new show in front of the store; the plaintiff was

presnt in the store, save the time occupied in transacting the business above referred to, from noon till about ten o'clock at night when the levy by the Sheriff was made, and during this time he was engaged in waiting upon some customers who came to the store.

The former owner Louis S. Shauer on one occasion by request assisted in the sale of a trunk, the price of which plaintiff was not familiar with. Louis Shauer was also in the store when the levy was made.

The plaintiff also read in evidence the deposition of H. H. Nash as follows:

Q. State your name, residence and occupation.

A. My name is Henry H. Nash, Chicago, of lawful age; occupation Cashier of the Chicago National Bank.

Q. Are you familiar with the business of the bank?

A. Yes sir.

The plaintiff then offered to read in evidence parts of the deposition of the above named H. H. Nash, relating to three certain checks to the amount of $650.00, $270.87 and $2,100.00 respectively which checks were in evidence in the case as exhibits and showed upon their faces to have been drawn by G. G. Shauer, plaintiff, upon the Chicago National Bank, in favor of Louis S. Shauer. The first two checks named, as alleged by the plaintiff, had a tendency to show the payment of the money from G. G. Shauer to his brother Louis S. Shauer, making a part of the indebtedness in question, and the third check of $2,100.00 was the check which the plaintiff claims to have passed to Louis S. Shauer as a part of the consideration of the alleged transfer. On objection of the defendant, the Court refused, on the ground of being incompetent, to allow the plaintiff to read the an-

swer of the deponent relative to each of the before named checks in response to the following question:

"You may state whether or not that check has all the appearance of having passed through the bank in the ordinary course of business."

The plaintiff further offered to read in evidence other portions of the deposition of witness, Nash, showing what the marks and endorsement on the bank of each of said checks indicated; how such marks were made and by whom. The Court refused to allow such parts of the deposition to be read.

It appeared that this deposition was taken in Chicago, at the taking of which both parties appeared by counsel and that the witness, Nash, was cross examined at length by counsel for the defendant as to his familiarity with the business of the Chicago National Bank, of which he was cashier.

The defendant was allowed, under objection by plaintiff, to read in evidence a confidential business statement of Louis S. Shauer, made in January, 1885, to Bradstreet's Commercial Agency at Sioux City, Iowa. This statement concealed the indebtedness of Louis S. Shauer to his brother, the plaintiff, which existed at that time. It was not shown that this statement was brought to the knowledge of plaintiff nor to any of the creditors of Louis S. Shauer. All the indebtedness against Louis S. Shauer, upon which the defendant relies, was created at and subsequent to September, 1885.

Record pp. 29—30.

The case was tried by a jury; on the trial the plaintiff requested the Court to give certain instructions to the jury.

which were refused.

Record pp. 30—31—32,

At the request of the defendant and upon its own motion the Court gave certain instructions to the jury to which the plaintiff excepted.

Record pp. 32—33—34—35—36—37.

The verdict of the jury was in favor of the defendant.

Record p 38.

Plaintiff at the proper time moved to set aside the verdict of the jury and grant a new trial on the ground of errors occuring at the trial, which motion the Court overruled.

Record p. 17—22.

Judgment was rendered in favor of the defendant.

Record p. 22..

Plaintiff Appeals.

BRIEF.

In support of the Appeal counsel for Plaintiff in error submit the following points and citations.

FIRST.

Plaintiff should have been allowed to read in evidence the deposition of H. H. Nash, Cashier of the Chicago National Bank.

Record p. 29.

Three checks in amounts of $650, $270.87, and $2,100, respectively were alleged to have been delivered by plaintiff to Louis S. Shauer and to represent part of the indebtedness existing between these parties. These checks purported to have passed in the ordinary course of business through the bank where plaintiff transacted his business. Each and every transaction of this nature favorable to the plaintiff was attached by the defense as fictitious. It was

sought to show by the witness Nash that these checks had passed through the bank of which he was cashier and bore the bank's cancellation stamp. The indebtedness between the plaintiff and Louis S. Shauer being one of the principal issues on trial all evidence tending to establish this was material. Witness Nash had testified that he was Cashier of this bank and was familiar with its business. The Court refused to allow his deposition to be read wherein he testified concerning these checks, on the ground that he had not shown himself qualified to give such testimony.

Plaintiff maintains that the witness having testified that he held the position of cashier of this bank and was familiar with its business had qualified himself to testify further in explanation of the marks and stamps made on these checks as they passed through his own bank.

The duties of a Cashier of a National Bank seem to be well defined in law. Morse on Banks and Banking (page 156) uses the following language in stating these duties:

"The Cashier is the chief executive officer through whom the whole financial operations of the bank are conducted. Its money transactions, of ever description, though they may not be determined by his discretion, will yet be conducted by and through him. He has charge of all its property, its money, its securities, its valuable papers. He has the superintendence of its books of accounts. To transact as the executive officer of the bank the ordinary routine of business."

The following cases support this definition, *Merchants Bank* vs. *State Bank* (10 Wall 604.) *Baldwin* vs. *Bank of Newbury* (1 Wall 234,) *U. S.* vs. *City Bank of Columbus* (21 How 356.)

In *First Nat. Bank* vs. *Ocean Nat. Bank* (60 N. Y. 278) the Court says:

"It must be assumed that the officers of the Bank had and exercised the powers and performed the duties usually devolved upon and performed by persons occupying the same position in other Banks and such as they were in the habit of performing in the transaction of the current and ordinary business of the bank."

The duties of a Cashier being well defined and the Courts assuming that this officer always performs such duties, it follows that a person holding the office of cashier and familiar with the business of the bank, is acquainted with the details of the ordinary transactions falling in the line of his duties and hence is a competent witness to testify concerning the same.

SECOND.

Under objection by the plaintiff the defendant was allowed to read in evidence a written statement made by Louis S. Shauer to Bradstreet's Commercial Agency of Sioux City, Iowa.

It was not shown that the plaintiff or any of the attaching creditors had knowledge, at any time, of this statement.

The statement was made about one year previous to the sale in question. The object of the evidence was to show a false representation on the part of Louis S. Shauer as to his financial condition.

The only allegations of fraud charged by the defendant is that December 16th, 1885. Louis S. Shauer being insolvent, made a fraudulent sale of these goods to the plaintiff, which sale was for the purpose of defrauding his (Louis S. Shauer's) creditors.

Under the issue, formed by pleading fraud of this character, admissions by Louis S. Shauer, made at this remote period would be irrelevant. The act was too remote to have any bearing on this fraudulent sale. Its effect would be to create prejudice in the minds of the jury.

In the case of *Hardy* vs. *Moore* (17 N. W. R. 200.) witnesses were allowed to testify to a separate conveyance made over one year prior to the fraudulent sale then in question.

The Court says, "Inasmuch as the transaction spoken of by the witness took place prior to the time plaintiff claims to have purchased the goods, the evidence as to him was inadmissable. It is difficult to see upon what grounds the admissability of this evidence can be properly placed. Where two transactions are claimed to be fraudulent and only one is being controverted, it must be shown they are so connected as to evince a common purpose before the uncontroverted transaction can be admitted in evidence, for the purpose of establishing the other to be fraudulent."

In *Bixby* vs. *Carskaddon* (29 N. W. R. 627 Iowa) it is held " that prior conversations are fraudulent acts on the part of the debtor are not admissable in evidence in a case involving the bona-fides of the debtor in making a sale of his stock-in-trade, unless there is some connection between the two transactions."

Bump in his work on fraudulent conveyance (page 583) uses this language, "But if the act or declaration was so long prior to the transaction in controversy that it does not tend to throw any light on it, the evidence is not admissable."

THIRD.

The instructions given by the court upon the question of change of possession of the goods embraced in the transfer were not applicable to the state of facts shown by the evidence to have existed.

The plaintiff asked for the following instructions which were refused:

"The acts that will constitue a delivery and change of possession of property sold, so as to protect the parties to the transaction as against the creditors of the vendor, vary in different classes of cases and will depend very much upon the character and quantity of the property sold as well as the circumstances of each particular case. It is not demanded that the purchaser to take possession of the property go to an unusual expense and do that which is contrary to the usual course of business. If the purchaser takes possession which places him in that relation to the property which owners usually are to the like kind of property and does all reasonable acts with such property to inform the public of such purchase, and if such acts are open, public and notorious, then such purchaser has done all the law requires him to do."

"You are to take into consideration the surrounding circumstances, time the purchaser had been in control of the property, the kind of property and all these elements making up the condition of this alleged sale, and if from these circumstances you find that Gustave G. Shauer took possession of the goods in question accompanied with such plaint and unmistakable acts of possession, control and ownership as a prudent bonafide purchaser would do in the exercise of his rights over the property so that all

persons might have notice that he owned and had possession of the property then you are instructed that he has done all the law required of him in this particular."

Record p. 31—32. Instruction No. 6.

On motion of the defendant the Court gave these instructions:

4 "You are instructed that a change of the property in controversy in this case must not have been merely nominal and momentary, it must have been real, actual and open and such as could be publicly known; if the property in controversy was permitted to remain in the possession of Louis S. Shauer, then such transfer was fraudulent in law as to the creditors of Louis S. Shauer notwithstanding the sale may have been to his brother in good faith and for a valuable consideration."

Record p. 33. Instruction No. 4.

In order to make this alleged sale and transfer from Louis S. Shauer to Gustave G. Shauer good in law, as against the creditors of Louis S. Shauer, it was necessary that there should be an actual change in possession of the property sold from Louis S. Shauer to Gustave G. Shauer and such sale must have been attended with such outward, open and notorious signs of actual change of possession, as could be seen and known at once to the public and to customers and people dealing with the goods. And if you shall believe that Louis S. Shauer and his clerk, after this alleged sale, still remained in possession of the store, selling and handling the goods as before, and there was no such outward, visible, open and notorious signs indicating a change of possession, then in law this sale was fraudulent

and void and you must return a verdict for the defendant R. F. Alterton."

Record p. 33. Instruction No. 6.

Upon his own motion the Judge gave these instructions:

"What is meant by an immidiate delivery and an actual "and continued change of possession? These words have "been many times construed by the Courts, and perhaps "I cannot do better than to give you the exact words of our "own Supreme Court in construing this section. This "statute means, in the language of our own Supreme "Court:

"That the sale shall be open and public, that the world "may be apprised of the change of ownership. The change "of possession must be actual and continued, and not sub-"ject to some secret trust between the buyer and seller.

"The delivery must not only be immidiate but the change "of possession must be so open and public that the world "may be apprised of the change of ownership.

"Some of the cases say that the change must of that "character that customers and those accustomed to fre-"quent the premises may at once be advised of the change "of possession by the change appearance of the property "or its change of custody."

Record p. 36.

The evidence in this case shows that between the parties the transfer was completed about noon of December 16th, 1885, and that on the same date not far from ten o'clock in the evening, the levy by the sheriff occurred. The evidence further shows that during this half day the plaintiff had been continually engaged in the business of the store, that he had possession of the keys of the store and was in the

store building when the levy occurred, that he had placed advertisements in each of the newspapers offices of the City opened an account at a local bank, been to three insurance agents and affected the transfer of insurance policies to his name, that he ordered a sign painted for the purpose of placing it over the door of the store and in general had occupied the same relation to these goods that any bona-fide owner would do in the same length of time.

The instructions given state an arbitrary rule which is in substance that the change in possession must be accompained by such outward and visible signs that the world may be at once apprised of the change.

No reference is made to time in which such visible signs may be given, the character of the property transferred or the circumstances surrounding the transaction.

It was the refusal of the Court to qualify this rule by giving the instructions asked by the plaintiff which furnishes the ground of plaintiffs exception. The Court in these instructions uses the language of the decision rendered in *Grady* vs. *Baker* (3 Dakota 296). In this case 12 or 16 days elapsed between the date of sale and time of levy. In the case in controversy this period is represented by a few hours.

The statute of South Dakota is similar to that of California. The case of *Grady* vs. *Baker* supra. is based upon the decision of that State. By a well established line of decision the Court of California defines the law to be. that no arbitrary rule can be given which will govern all cases, that each case must be guided by the surrounding circumstances.

In *Clafflin* vs. *Doub*. (14 Cal. 387.) the Court referring to

this statute, says: "The words of the rule are not to receive an unreasonable construction. Although delivery be requisite in cases of sales, yet, what will constitute a delivery, must depend, in some measure, upon the character of the article sold and the peculiar circumstances of the case. Mr. Parsons on Contracts (Vol. 2. p. 323) says: It may be said in general that a delivery must be a transfer of possession and control made by the seller with the purpose and effect of putting the goods out of his hands. This is a sufficient delivery, whatever its form. Hence it may be constructive as by delivering the key of a warehouse, or making an entry in the books of a warehouse keeper, or delivery with an endorsement of a bill of lading or even of a receipt, or without even such, when the goods are bulkey and difficult of access as a quantity of timber floating in a boom, or a mass of granite, or a large stack of hay."

In *Stevens* vs. *Irwin*, (15 Cal. 507.) in construing this statute, in the Court, says: "A reasonable construction must be given to this language, in analogy to the doctrines of the courts holding the general principles transcribed into the statute. The delivery must be made of the property; the vendee must take the actual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must in other words, be in the usual relation to the property which owners of goods occupy to their property."

The case of *Lay* vs. *Neville*, reported in (25 Cal. 553,) is a strong decision upon this subject and is cited as au-

thority in later cases. The facts of this case briefly stated are these: a sale of a large quantity of wheat was made, the purchaser with several teams was engaged in removing the same from the ranch where the property was kept when the sale occurred. When the wheat was partially removed a levy was made and the wheat still remaining on the ranch was taken as the property of the vendor.

Judge Rhodes in rendering the opinion of the Court says: "It is not intended by the fifteenth section of the Statute of frauds to make a sale void, as against the creditors and purchasers of the vendor, unless the vendee shall perform in every case what might in some cases be an impossibility. It was intended that the vendee should immediately take and continuously hold the possession of the goods purchased, in the manner and accompanied with such plain and unmistakable acts of possession, control and ownership as a prudent bona-fide purchaser would do, in the exercise of his rights over the property so that all persons might have notice that he owned and had possession of the property. The acts that will constitute a delivery will vary in the different classes of cases, and will depend very much upon the quantity and character of the property sold. As well as the circumstances of each particular case. The same acts are not necessary to make a good delivery of a ponderous article, like a block of granite or a stack of hay as would be required in case of an article of small bulk, as a parcel of bullion. It might properly be required, that there should be a manual delivery of a single sack of grain at the moment of its sale, but upon the sale of two thousand sacks, this could not be done without incurring great and

unnecessary expense, and departing from the usual course of business."

The doctrine of these cases as affirmed in the later decisions of *Gutchaux* vs. *Mulford* 26 Cal. 317.

Wood vs. *Bugby* 29 id. 466.

Parks vs. *Barney* 55 id. 239.

The Court of Colorado affirms these cases in Bassinger vs. *Sprague* 10 Pac. Rep. 809.

In the very recent decision of *Tunell* vs. *Larson et al.* 39 N. W. R. 628. the Minnesota bench through Judge Collins uses this language: "Precisely what constitutes a delivery and change of possession must depend largely upon the kind and nature of the chattels, the situation of the parties, and all the circumstances peculiar to each case. No arbitrary rule can be laid down."

The instruction asked by plaintiff was in harmony with these decisions, and was written in almost the same language used in the case of *Lay* vs. *Neville*, supra.

Another exception plaintiff makes to this branch of the case is to the instruction given at the request of the defendent wherein these words are used: "If the property in controversy was permitted to remain in the possession of Louis S. Shauer, then such transfer was fraudulent in law as to the creditors of Louis S. Shauer notwithstanding the sale may have been to his brother in good faith and for a valuable consideration." This was given without any modification or explanation of the use of the word possession. Appellant maintains that as this term is ordinarly used, the jury would be led to infer from such instruction that after the sale Louis S. Shauer, the vendor, could not under the

law remain in charge of the goods even as agent of the vendee.

The Supreme Court of Dakota in *Grady* vs. *Baker* 3 Dakota 299. adopted this rule: "The employment of the vendor by the vendee after the sale may be proved as a fact tending to show that there has been no actual or continued change of possession; but when proved it does not become conclusive of the question, but only an element of the proof to be weighed by the jury."

Such being the law of Dakota territory, the instructions given without explanation would be misleading to the jury.

FOURTH.

Conceding, for the purpose of argument, that notice to the vendee would charge him with a fraudulent intent of the vendor, then the appellant maintains that actual and not constructive notice of such intent is a necessary element to charge a purchaser for a good consideration.

Upon this branch of the case, at the request of the defendant, the jury was instructed as follows:

"Actual knowledge of any fraudulent intent on the part of the seller is not essential to render a sale void; and you are instructed that if the facts brought to the attention of Gustave G. Shauer were such as to awaken suspicion and lead a man of ordinary prudence to make inquiry and he fails to make such inquiry, then he is chargeable with notice of fraudulent intent and with a participation in the fraud, and it will be your duty to find for the defendant."

Record p. 33. Instruction No. 2.

The statute of Dakota territory (Sec. 2023 Civil Code) makes intent an essential ingredient of a fraudulent transfer. Fraudulent intent of the vendor alone will not vitiate a

sale. The vendee must also become a party to the fraud. Both parties must have participated in the fraudulent act.

A leading case in Mass. *Foster* vs. *Hall*, 12 Pick. 89. Am. Dec. 409 states this proposition in these words:

"The fact to be proved was, that the conveyance was with a fraudulent intent to delay or defeat the creditors of the grantor, by preventing them from securing their debts by attachment, in which case, as against such creditors, the conveyance would be inoperative and void. But the law does not put this construction upon the conveyance unless there was a fraudulent intent in both parties, nor can the estate of the grantee be defeated by showing a fraudulent purpose in the grantor unless it be also shown that the grantee participated in it, and by his concurrence promoted it. The proposition then to be established is that the grantee knew of this intent and purpose, and participated in it."

The Michigan Court states the rule in these words:

"To render a conveyance void for fraud upon its creditors it is necessary that the grantee should have a knowledge of, and in some way participate in the fraud."

Fraser vs. *Passage*, 30 N. W. R. 334.

"Both vendor and vendee must be shown to commit the fraud before the deed can be avoided."

Gridley vs. *Bingham*, 51 Ill. 153.

Hatch vs. *Jordan*, 74 Id. 417.

"Unless he, the vendee, intended to aid the other parties in hindering and delaying their creditors in the collection of their debts he was entitled to hold the goods."

Waterman vs. *Donaldson*, 43 Ill. 29.

"To render a sale or conveyance fraudulent as to cred-

itors of the vendor, there must be mutuality of participation in the fraudulent intent on the part of both the vendor and the purchaser."

Schroeder vs. *Walsh*, 11 N. E. R. 70 (Ill.)

The United States Supreme Court says:

"The fraud which will vitiate a sale must be mutual that is, must be attended by both parties or by one with knowledge of the others purpose and thus acquiesed in and furthered."

Horbach vs. *Hill*, 5 S. C. R. 81.

This rule is a general one.

Bridge vs *Eggleston* 14 Mass. 245.

Mehlop vs. *Pettibone*, 11 N. W. R. 553. (Wis.)

Splawn vs. *Martin*, 17 Ark 146.

Partello vs. *Harris*, 26 Conn. 480.

Fifield vs. *Garton*, 12 Iowa 218.

Brown vs. *Smith*, 7 R. Mon. 36. (Ky.)

Byrne vs. *Becker*, 42 Mo. 264.

Weisiger vs. *Christlwen*, 28 Tex. 780.

Leach vs. *Francis*, 41, Vt. 670.

To participate in a fraud, to be a party to the act, the grantee must necessarily have knowledge of the vendors intent. Without actual knowledge of such intent the vendor cannot be guilty of a wrong,

A leading authority uses the following language in this connection.

"Constructive notice is not *prima facie* evidence of actual knowledge of the fact, and therefore constructive notice is always insufficient to fix in a party actual knowledge as the ground work of express fraud."

Wade on Notice page 23.

Judge Miller in *Stearns* vs. *Gage* (79 N. Y. 102) puts the proposition in these words:

"Actual notice is required where a valuable consideration has been paid. Circumstances to put the purchaser on inquiry where full value has been paid are not sufficient. If he knew of the fraud, that would be enough. It is not found that he had such knowledge in the case considered. As there is no such finding we may assume that he had no knowledge of the fraud, and without this no case is established which would invalidate the conveyance to him and warrant the conclusion of the referee. No authority has been cited which sustains the principle that a purchaser for a valuable consideration, without previous notice, is chargeable with constructive notice of the fraudulent intent of his grantor; and such a rule would carry the doctrine of constructive notice to an extent beyond any principle which has been sanctioned by the Courts, and cannot be upheld."

This case is one where a conveyance of land made for a full consideration was sought to be set aside on the ground of fraud to creditors of the grantor. In the findings, the referee found the facts were sufficient to put the grantee, at the time he purchased and took the deed, upon inquiry as to the real nature and intent of the transaction."

In a later and thoroughly digested case the rule is stated in stronger terms by the same Court. (*Parker* vs. *Conner* 93 N. Y. 118.) This was a case similar to the one at bar where a Sheriff was sued for conversion of personal property and justified under an execution alleging fraudulent sale by the debtor. The question discussed arose upon the charge given the jury at the trial in the lower Court. The

instruction was as follows:

"Did he (the grantee) have notice of facts in the case which would awaken the suspicion of a man of ordinary intelligence and caution, and which, if acted upon by him and investigated by him, would have enabled him to have known that Halloran (grantor) had a fraudulent intent. In that case Mr. Parker (grantee) would be infected with Mr. Hallorans fraudulent intent."

Judge Rapallo says: "These exceptions bring up squarely the question whether the doctrine of constructive notice is applicable to cases of this description, or whether, in order to render a sale for a valuable consideration invalid as against the creditors of the vendor, it is necessary that the vendee should have actual knowledge or belief, or at least actual suspicion that the sale is being made with intent on the part of the vendor to hinder or defraud his creditors.

"By the charge as given, and the refusal to charge, the doctrine of constructive notice was applied in all its strictness to the case in hand, and under the rule laid down by the Judge, a purchaser of chattels, notwithstanding that he has paid full value for them, and has taken them into his actual possession, and may not in fact have known that the vendor was indebted, or even suspected any fraudulent intent on his part, may be charged as a party to a fraudulent scheme of his vendor, provided it appears that the facts were known to the vendee, which, in the opinion of the jury, should have put a man of ordinary intelligence on inquiry, and investigation would have enabled him to discover the fraud. In other words, although the vendee acted, in fact, in good faith, and did not even suspect fraud.

yet, if the jury think he ought, under the circumstances, to have been suspicious, and to have looked for fraud, his innocent confidence in the integrity of his vendor must be punished by the loss of his title, and he must be charged as a party to any fraud which investigation would have disclosed.

"There can be no doubt that it is legitimate for the jury in such cases to consider whether the vendee had knowledge of facts pointing to a fraudulent intent or calculated to awaken suspicion, and that actual notice of a fraudulent intent on the part of the vendor need not be established by direct proof. The fact of notice or knowledge may be inferred from circumstances. But if the doctrine of constructive notice is applicable, it is immaterial how the fact is. The jury may be satisfied that the purchaser was, in fact, entirely innocent and free from any guilty knowledge or even suspicion of fraud: but if they find that facts were known to him, which were calculated to put him on inquiry, his want of diligence in making such inquiry is equivalent to a want of good faith—and the presumption of notice is a legal presumption which is uncontrovertible."

After reviewing at length the authorities on this subject the Court closes the opinion in these words:

"We see no reason why the same principle as to what constitutes a bona-fide purchaser should not apply to purchasers for value of personal property, as they are applied to transferres of negotiable paper, especially where, as in the present case, the vendor's title and legal right of disposition are unquestioned, and the ground upon which the transfer is impeached is not any defect in the chain of title, but that the vendor's motive in selling was to hinder, delay

or defraud his own creditors. In such a case there is no duty of active vigilence cast upon the purchaser, for the benefit of creditors of the vendor, which should require him to suspect and investigate the motives of the vendor. If he knows or believes them to be fraudulent, he has no right to aid the vendor in his fraudulent scheme, and by so doing he makes himself a party to the fraud. But fraud should not be imputed by the application of the strict rules of constructive notice in such a case, and actual good faith should be sufficient to protect the purchaser."

In connection with the case last above cited we will notice the rule adopted by the Supreme Court of the State of Kansas, from which the inctruction complained of was taken. The rule as stated by this Court was as follows:

"If the circumstances surrounding his purchase are such as would put a prudent man upon inquiry, which, if prosecuted diligently, would have disclosed a fraud, he cannot be deemed a *bona-fide* purchaser in good faith."

Philips vs. *Reitz* 16 Kan. 396.

McDonald vs. *Grant* 2 Pac. R. 871.

Golluber vs. *Martin* 6 Pac. R. 268.

These cases cite as authority the earlier case of *Baker* vs. *Bliss* 39 N. Y. 70. In the case of *Parker* vs. *Conner supra.* the eminent Court ably analyzes the doctrine of *Baker* vs. *Bliss* and shows that it does not apply to cases parallel to the one at bar, nor to the class of cases in which it is applied by the Kansas Court.

After careful search, counsel for plaintiff is unable to find any other well considered decisions where the doctrine of constructive notice is adopted to its full extent in this character of cases.

The Court of Mass. has ably shown the distinction existing between actual notice and circumstances which should put a party upon inquiry. (*Carroll* vs *Hayward* 124 Mass. 120). In the action for conversion of personal property plaintiff was met with the defence that one, Casgrove, had made a fraudulent sale of the property and plaintiff was chargeable with the fraud. The Judge instructed the jury on the trial in the lower Court as follows:

"If the plaintiff had reasonable cause to know that Casgrove entertained such purpose, then the plaintiff could not recover."

Judge Ames in rendering the opinion of the higher Court says:

"From the circumstances under which this last instruction was given, and from the fact that the attention of the Judge was called to the necessity of proving knowledge, on the plaintiff's part, of the alleged fraud, it is impossible to avoid the conviction that the jury must have understood that something short of actual knowledge would be sufficient to maintain the defence. There can be no doubt that knowledge of any purpose or thing may be proved, like any other fact, by circumstantial evidence. The plaintiff's opportunities and means of knowledge, his greater or less intimacy with the other parties and his familiarity with their business and financial affairs, his intelligence and observation, would, in such an inquiry, be matters proper for the consideration of the jury. Reasonable cause to know is evidence having a tendency, and generally a strong tendency to prove that the party in question did know, but is a mistake to say that it is the same thing as knowledge. What might convince one man might

be insufficient to satisfy the mind of another."

The rule stated above is also tersely given in *Greene* vs. *Tanturn* 19 N. J. Eq. 112. It is as follows:

"A person is to be charged with notice when he is acquainted with circumstances sufficient to convince a Court or jury of the truth of the fact."

FIFTH.

When a transfer is accepted by a creditor with the sole purpose of obtaining satisfaction of his own claim, the intent of the vendor, and the purchaser's knowledge of such intent is immaterial.

In such case the purchaser is not a mere volunteer and the transfer is distinguished by the authorities from a purchase upon a consideration advanced at the time.

Bearing on this point:

At the request of the defendant the jury was instructed as follows:

2nd. "You are instructed that a conveyance or sale of property made with the intent on the part of the seller to either hinder or delay or defraud a particular creditor in the collection of his debt, is void as against all the creditors of the seller, if the intent be known to or participated in by the purchaser although made for a good and valuable consideration."

Record p. 32, Instruction No. 1.

Upon its own motion the Court instructed the jury as follows:

"Therefore should you find from the evidence that Louis S. Shauer was fairly and honestly indebted to his brother Gustave Shauer in the full amount claimed, which I believe is about $6,700. you will remember the exact amount, and

that with the honest intention of securing such indebtedness he purchased the property in question without notice or knowledge of fraudulent intent on the part of Louis S. Shauer to delay or defraud his creditors, and without any intent on his own part to secure any interest in said property, present or future, to his brother Louis and without any intent to delay or defraud the creditors of Louis S. Shauer, then he is entitled to recover, whatever may have been the intent of Louis Shauer himself—for the intent of Louis Shauer can affect the plaintiff only in the case that he knew, had notice, or as a prudent man had knowledge sufficient from the circumstances to put him upon inquiry as to his brother's fraudulent intent."

Record p. 33.

The court refused the request of the plaintiff to give the following instruction:

"You are instructed that a debtor in failing circumstances has a right to prefer one creditor to another and to pay or secure one creditor with goods obtained on credit from another creditor: and it makes no difference that such preference will have the effect to defeat all other creditors. The preference may be given to any lawful demand against the debtor, whether due or not, and whether held by his brother, wife, attorney or any other person. The secret motives which prompt the preference are immaterial.

When the act is right no secret feelings can change its character. One creditor of a failing debtor is not, under the statute, bound to take care of the others.

In such case if the assets are not sufficient to pay all somebody must suffer. He who has the advantage of pref-

erence, whether by the favor of the debtor, of his superior vigilance, or by both causes combined, is entitled to what he wins, if got to satisfy an honest debt."

Record p. 31. Instruction No. 3.

The instructions given ignore the distinction between a volunteer purchaser and a creditor seeking payment of his demands.

The testimony of plaintiff tended to show that the sole object on his part of the transfer was the collection of his debt.

In view of this evidence, the instructions, without some qualifications, do not state the correct rule of law.

Judge Black in the well known case of *Covanhovan* vs. *Hart* 22 Pa. St. 495 (60 Am. Dec. 57) made use of the following language: "If a debtor, with the purpose to cheat his creditors, converts his land into money, because money is more easily shuffled out of sight than land, he of course commits a gross fraud. If his object in making the sale is known to the purchaser, and he nevertheless aids and assists in executing it his title is worthless as against creditors, though he may have paid a full price. But the rule is different when property is taken for a debt. One creditor of a failing debtor is not bound to take care of another. It cannot be said that one is defrauded by the payment of another. In such cases, if the assests are not large enough to pay all, somebody must suffer. It is a race in which it is impossible for everyone to be foremost. He who has the advantage, whether he gets it by the preference of the debtor or by his own superior vigilance, or by both causes combined, is entitled to what he wins, provided he takes no more than his honest due. To pay a creditor his just debt

in land, at a fair valuation, is no more a fraud upon the other creditors than to pay in bank-notes or silver dollars. Neither is it any worse or more fraudulent for a creditor to secure himself by taking a conveyance than it would be to enter up a judgement. He gets no greater advantage by the former means than by the latter. The notion of the defendants in error seems to be that the creditor of an insolvent man cannot avoid the imputation of fraud in any way except by cheating himself. But they themselves did not act upon that principle. They struggled to get a lien upon the very property in dispute; and if they had succeeded, would have done to the plaintiff the same injury (if it be an injury), which he did to them by taking the conveyance."

The judge said in his charge that little room is left to attribute fraudulent motives, when a debt is actually due from the vendor nearly equal to the value of the property. He should have said there is no room at all. A human tribunal can take no cognizance of feelings and intentions which are not manifested by external conduct. We are not permitted to assign a bad motive to an act which is not wrong either in itself or in its necessary consequences. A creditor is not acting wrongly when he receives payment or takes security for his debt though he knows that other persons who have the same rights with himself may be less vigilant or less fortunate. The act being right, no secret feeling can change its character.

Indeed, it may be said that the motive which results in proper action can not be a bad one."

In the case of *Dudley* vs. *Danforth* reported in 61 N. Y. 626, an action was brought for conversion of personal prop-

erty. The referee was asked to find, "that the alleged sale and transfer was made with intent on the part of Edget (a debtor) to hinder and delay his creditors, and that the plaintiffs had previous notice of such intent on the part of Edget."

This finding the referee refused. The Court of Appeals held "that assuming the evidence would have justified such a finding it would not have invalidated the purchase without a further finding that the plaintiffs participated in such intent."

In a very recent case the court of Missouri states this proposition, "Generally, a single sale of property, with the intent on the part of the seller to thereby hinder, delay, or defraud his creditors, and knowledge of such intent on the part of the purchaser, renders the sale void, though the purchaser pay a valuable consideration for the property, because the purchase of the property under such circumstances amounts to a participation in the intended fraud." *Dougherty* vs. *Cooper*, 77 Mo. 529; *Fredrick* vs. *Allgaier*, 88 Mo. 601. But a debtor, though unable to pay all of his creditors, may pay one or more, to the exclusion of others, either in money, or the transfer of property, and the favored creditor or creditors may accept such preference. If the preferred creditor in such cases, acts in good faith, and takes the money or property for the sole purpose of saving a bona-fide debt, mere knowledge that the debtor intended to hinder, delay or defraud his creditors does not render the transaction void as against the creditor taking the preference for simple knowledge under such circumstances, it is held, does not amount to a participation in the intended fraud. *Shelly* vs. *Booth*, 72 Mo.

73. *Albert* vs. *Bessel*, 88 Mo. 150, *Fredrick* vs. *Allgaier*, *supra*."

Sexton vs. *Anderson et al*, S. S. W. R. 564.

Also in the case of *Hirsch* vs. *Richardson*, 3. S. R. 569. the Missisippi Supreme Court lays down a similar rule. On trial of the case the following instruction was given: "If the jury believe from the evidence that I. B. Cohen made the sale of the goods in controversy to Hirsch Bros. & Co., for the purpose of defrauding creditors, and Hirsch Bros. & Co. knew, or had good reason to believe, that such was his intention, then the sale was void as to Cohen's creditors, and the jury will find for the plaintiffs." Regarding this instruction the higher Court says: "The twelfth instruction for the plaintiffs should not have been given. By it the jury was directed to find for the plaintiffs if Cohen sold the goods to the claimant for the purpose of defrauding his creditors, and the claimant knew, or had good reason to believe, that such was his purpose. It ignores the rights of the purchasers in good faith to buy the goods to secure payment of their own debt, regardless of the purpose or intent with which the seller sold. The rule declared would be a proper one where a person having no connection with a debtor as his creditor, should for the purpose of enabling the debtor to convert his property into money or choses in action to defraud his creditors, aid him in the scheme by purchasing his tangible property. But where one has a debt due him, and buys for the purpose of securing that debt, and not for the purpose of aiding and abbetting the debtor to defraud his creditors, the rule does not apply."

The Supreme Court of Kentucy states this rule with logical force. In the case of *Brown* vs. *Force*, 73 Monroe

357 (46 Am Dec. 519) it is said, "The first and third instructions asserts in effect, that if a purchaser of property from an indebted vendor knows at the time of his purchase, that the vendor makes the sale with the intent of thereby hindering or delaying any of his creditors from making their debts by execution, or of delaying them in the regular course of collecting their debts by law, such knowledge furnishes conclusive evidence of fraud in the vendee, and makes his purchase void, although he may actually pay a full consideration for the property. But the debtor himself, though he resorts to a sale for the purpose of hindering and delaying some of his creditors, may intend it as a means of paying others; and if this be so, or if the vendee has reasonable grounds for supposing it to be so, the mere knowledge that the vendor intends to hinder and delay some of his creditors, can not establsh, or at least cannot conclusively prove as against him any fraudulent intent. If a sale is made with the fraudulent intent on the part of the debtor of thereby placing both his property and its price out of the reach of his creditors, and of thus defeating them in the collection of their debts, it would be difficult to avoid the conclusion, that if the purchaser, being under the necessity to purchase, knew of this fraudulent intent, and made the purchase without taking any means to prevent its effectuation, he must be regarded as having participated in it.

But on the other hand, if absolutely certatn, that the purchaser actually pays out of his own means and irrevocably, full consideration for the property, and especially when he secures a considerable portion of it to the payment of the vendor's debts in some of which he is bound himself

Mr. Bump in his work on fraudulent conveyances (page 194) says: Although the purchase exceeds the amount of the indebtedness, still if the excess is reasonably necessary for attaining the lawful purpose of satisfying the actual debt, the purchase to the whole extent may be attributed to the same motive of self interest, and therefore the mere fact of the excess does not of itself invalidate the transaction, unless there are other circumstances tending to show a fraudulent intent on the part of the purchaser. In payment of the excees the creditor may give either money or his note."

In the case of *Buerman* vs. *Van Buren* (44 Mich. 496) the judge instructed the jury in substance, "that if Van Buren purchased in good faith in payment of an actual debt from French to himself and gave to French for the difference between the debt and the price of the goods his three negotiabe promissory notes as alleged, he got a good title as against creditors even though French may have sold with intent to defraud them." In passing upon this the supreme court says: "This was correct. Where a person buys for the sole purpose of obtaining payment of an honest debt, the circumstance that the seller intends to hinder or defraud his creditors does not make the sale void. It must be made out that the buyer participated in the fraudulent intent."

The supreme court of Mississippi in a recent case (*Hirsch et al* vs. *Richardson*, 3 S. R. 569) after stating that a vendee in making a purchase to secure a debt may pay an excees in money without invalidating the sale even if he knows that the sum paid will be withheld from the creditors of the vendor, says "the test is whether the payment is made to aid the fraudulent debtor, or for the lawful purpose of securing payment of his own debt."

Budlong et al vs. *Kent*, 28 Fed. Rep. 13.
Young vs. *Stallings*, 5 B. Mon. 307.
Ford vs. *Williams*, 3 B. Mon. 550.
Little vs. *Eddy*, 14 Mo. 160.
Bears Estate, 60 Penn. 430.
Hobbs vs. *Davis*, 50 Geo. 213.
Tronstine vs. *Lask*, 4 Baxter, 162.
Rochling vs. *Byers*, 94 Penn. 316.

In this connection the fact must be borne in mind, that a stock of goods sold at judicial sale is almost universally sacrificed, and the alleged debt in this case would have consumed the entire property had the usual closing out proceeding been followed. The acts of good faith on the part of the debtor in attempting to save as much from the property as possible and meet other debts, is the very conduct which the attaching creditors complain of as an evidence of fraudulent intent.

SEVENTH.

The fact of the parties to transfer being related is not a badge of fraud. Relatives have the same right to transfer property as have strangers. No presumption of fraud arises in case of a sale between them.

The jury were instructed as follows: "Transfers to one's wife or members of his family are carefully scrutinized. experience having taught that such conveyances are more frequently fraudulent than transaction between strangers or those not intimately acquainted.

Record p. 34.

This language would have a tendency to lead the jury to infer that the mere fact of the parties being related would raise a suspicion against the good faith of this transaction.

Counsel for plaintiff maintains that the correct rule is stated in these words: "Business dealings between parents and children, or relatives, are to be treated as are the transactions of other people; and if the *bona-fides* thereof is attached, the fraud alleged must be proved."

Curry vs. *Loyd*, 22 Fed. Rep. 267.
(*U. S. District Court for Penn.*)

"Our law permits debtor to give preference among creditors; and he may prefer his wife as a creditor with quite as much justice and propriety as any other."

Hill vs. *Bowman*, 35 Mich. 193.

See also:

Farmers and Co. Bank vs. *Warner*,
26 N. W. R. 27.
City Bank vs. *Wright*, id. 35.
Adams vs. *Ryan*, 17 id. 161.
Rehling vs. *Byrne*, 91 Penn. St. 318.
Bump on Fraudulent Transfers, p. 56, and
cases therein cited.

Further exception is taken to this instruction for the reason that by thus commenting upon the evidence, the court invades the province of the jury. It is admitted that the fact of parties being relatives or otherwise intimately connected may be considered by the jury as one of the circumstances surrounding the transaction, and it would have been proper for the court to have so charged, but in making the statement that conveyances are more frequently fraudulent between such parties is a step beyond the authorized boundary line.

Mr. Chief Justice Lawerence in the case of *Herkelrath* vs *Stockey*, (63 Ills. 486) says: "It is for the jury to de-

termine from the entire evidence, what inference is to be drawn, without being instructed by the court as to what weight they are to attach to any particular portion of it. When the court says that a certain inference may be drawn from certain facts, if proven, most juries would understand the instruction as meaning that it was their duty to draw such inference."

People vs. *Mitchell*, 55 Cal. 236.

People vs. *Walden*, 51 id. 588.

People vs. *Wongah Ngow*, 54 id. 151.

In the case at bar when the jury are told that transaction between relatives are more frequently fraudulent than between other persons the jury are led to believe that the mere fact of the parties to this sale being relatives is in itself a suspicious circumstance, when such is not the law.

The court tries to limit the effect of the instruction as given, by admitting that such sales are sometimes honest and bona-fide, and that too much stress or even importance should not be given to the fact of relationship alone.

The court should have told the jury that *no stress* or *importance* should be given to the fact of relationship alone

We do not believe that any authority can be found, certainly the appellees in the court below cited none, which hold that the fact of relationship alone is sufficient proof, that a conveyance is fraudulent. The jury were justified in the belief, under this instruction, that they should lay some stress upon, or give some importance to the fact of relationship, and if so, without other evidence in the case, would be warranted in the belief that that fact caused the

weight of evidence to preponderate in favor of the defendant.

We respectfully submit that, alone and unconnected with other circumstances in evidence, the fact of relationship between the vendor and vendee is entitled to no stress or importance whatever.

The Supreme Court of Illinois, in discussing an instruction dealing with the principal under discussion after citing authorities, say: "Thus it will be seen that the mere fact of relationship, without other facts and circumstances, affords no presumption of law against the bona-fides of a sale from one to the other."

"It may excite suspicion and may be considered with other evidence tending to impeach the transaction."

Schroeder vs *Walsh*, 120 Ill. 403.

EIGHTH.

Upon the question of burden of proof, the plaintiff requested the court to give the following instructions, which were refused:

1. It is alleged by the defendant in this action that this transfer was fraudulent and void. You are expressly instructed that the burden of proving this alleged fraud is upon the defendant and he must do so by a fair preponderance of the evidence. In this connection you are instructed that the law presumes that all persons transact their business honestly and in good faith until the contrary appears from a preponderance of the evidence. Fraud will never be imputed when the facts upon which the charge is based are or may be consistent with honesty and purity of intention."

2. "If the jury believe that the circumstances attending

the sale and transfer in this case of the goods and property in question from Louis to Gustave Shauer, the plaintiff, are consistent either with a fraudulent intent or with honesty of purpose, then the jury will not be justified in inferring that such transaction was fraudulent. The burden of proof, so far as showing the purchase of goods in question to be fraudulent, rests upon the defendant. And in order to defeat this action it is incumbent upon the defendant to satisfy you by a clear preponderance of evidence that such transfer was not taken by the plaintiff, Gustave Shauer, for the purpose of obtaining payment of a legal demand which he then held against his brother Louis S. Shauer."

Record pp. 30—31. Instructions 1 and 2.

Three propositions are set out in these instructions.

1. The burden of proving fraud rests on the defendant.

2. Law presumes that all persons transact their business relations honestly, until the contrary affirmatively appears.

3. Where the charge of fraud is alleged and it is sought to prove the allegation by certain circumstantial evidence, if the circumstances shown are consistent with good faith and honesty of purpose the law will not then permit its presumption of fraud to be drawn.

In stating the law on this question Mr. Bump says: "If the evidence is so conflicting that no conclusion can be reached, the transaction must be sustained upon the principle that the burden of proof is upon the party who assails it, and if he does no more than create an equilibrium he fails to make out his case. Mere suspicion leading to no certain results is not sufficient. A legal title will not be

diverted upon mere conjectures or evidence loose and undeterminate in its character. Fraud will never be imputed when the circumstances and facts upon which it is predicated may consist with honesty and purity of intention." The decission of *Clemens* vs. *Brillhart* et al 22 N. W. R. 779 (Neb.) affirms the proposition stated above.

The court of appeals in New York in the case of *Schultz* vs. *Hoagland*, 85 N. Y. 467: states the rule in these terms: "The case furnishes no exception to the rule that fraud is to be proved and not presumed." *Grover* vs. *Wakeman*. 11: Wend, 188. "It is seldom, however, that it can be directly proved and usually is a deduction from other facts which naturally and logically indicate its existence. Such facts nevertheless, must be of a character to warrant the inference. It is not enough that they are ambiguous, and just as consistent with innocence as with guilt. That would substitute suspicion as the equivalent of proof. They must not be; when taken together and aggregated when interlinked and put in proper relation to each other, consistent with no honest intent. If they are, the proof of fraud is wanting."

NINTH.

In answer to various objections made to different instructions given in this case, it has been said that the defects were cured by other portions of the charge given by the court.

A misstatement of law to a jury is not cured by afterward stating the correct proposition. The jury cannot decide and choose the proper rule between such different statements.

The Supreme Court of Dakota says:

"We are not aware of any authority holding that a jury may be expected to discover a lurking contradiction and decide correctly between different statements of law."

Pattee vs. *C. M. & St. P. Ry. Co.*
38 N. W. R. 436 (Dak.)
See also *People* vs. *Wong Ah Ngow*,
54 Cal. 151.

It is respectfully submitted that in the errors herein complained of, the plaintiff was deprived of a fair and impartial trial in the Court below, and by reason thereof the judgement of the Court should be reversed and a new trial granted.

HENRY W. MAGEE,
Attorney for Appellant.

A. E. HITCHCOCK,
E. W. ADKINSON,
of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 174.

GUSTAVE G. SHAUER, PLAINTIFF IN ERROR,

vs.

R. F. ALTERTON, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT.

DILLON & PRESTON,
Att'ys for Defendant in Error.

MORGAN H. BEACH,
Of Counsel.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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Brief of Messrs. Dillon & Preston.

It is not denied by appellant that the facts proven upon the trial below were sufficient to fully warrant the jury in returning a verdict for the defendant.

No objections are here urged to the admissibility of the testimony upon the trial, or that the verdict was contrary to the evidence. This case is brought here for review upon alleged errors in law occurring at the trial:

1st. In allowing the defendant to introduce in evidence a written statement of Louis S. Shauer, made on or about January, 1885, to Bradstreet Commercial Agency at Sioux City, Iowa.

In the month of September, 1885, Louis S. Shauer was indebted to his brother, Gustave G. Shauer, in an amount of

over $8,000 for money alleged to have been loaned and advanced to Louis since March 10, 1880, and also about the first of September, 1885, Louis visited Chicago to make his fall purchases of merchandise.

Rec., p. 28.

This piece of evidence has a tendency to show the fraudulent intent on the part of Louis S. Shauer by making false representations as to his financial condition and thereby gain a fictitious credit in the market.

While it is true that in order to invalidate a transfer for a valuable consideration it is necessary, nevertheless, to show two things, *first*, that it was made with a fraudulent intent on the part of the debtor, and, *second*, that the grantee had notice of and participated in it, yet these two propositions are in some respects independent of each other.

There may be a fraudulent intent on the part of the debtor and a specific act of fraud may not be known to the grantee, though proof of both must concur to establish the right of the creditor to recover. The evidence to prove these two propositions may be of different kinds and drawn from different sources. It may apply separately to the two branches of the case.

Evidence in regard to the conduct and declarations of the debtor prior to the transfer is admissible to prove the fraud on his part, and if this is proved the knowledge of it on the part of the grantee may be proved by any circumstance tending to show a participation in the designs of the debtor. These acts and declarations may be proved without proving knowledge on the part of the grantee of the particular acts and declarations from which the fraudulent intent is to be inferred.

Louis S. Shauer was the owner of this stock of merchandise in January, 1885, at the time he made this false representation to Bradstreet Commercial Agency as to his financial condition. At the same time it is claimed he was owing

his brother Gustave this large amount of over $8,000 since March 10, 1880. By withholding from the Commercial Agency the fact of this indebtedness to his brother, who eleven months afterwards makes the pretended purchase of all this stock, it must be apparent that his object was to preserve a fictitious credit in order to enable him to secure in the future this large purchase which he afterward made the September following.

In the case of Bridge *vs.* Eggleston, 14th Mass., 245, wherein certain conversations of one Goodwin, the grantor of Eggleston, and the judgment debtor in the judgment which was intended to be satisfied by a levy and the land demanded in the action, it appears that the conversation took place several months before the alleged transfer; that the substance of his statement was that he expected to be ruined by his connection with a certain bank as director, and that he thought it best to pay as little of his debts as possible. Counsel says in his brief, p. 9, folio 35, that the fact of this statement made by Louis S. Shauer in January, 1885, was too remote to have any bearing on this alleged fraudulent sale.

The case of Hardy *vs.* Moore, 17th N. W. Rep., 200, cited by appellant, was a case wherein it was attempted to show fraud in the transaction in controversy by certain conveyances of real estate having been made between the same parties two years previous. There was no testimony showing the conveyances themselves to have been fraudulent. In the case at bar, it is admitted that the statement made by Shauer to the Commercial Agency, about nine months before the goods were purchased from the various attaching creditors and about eleven months before the alleged transfer to his brother Gustave, was false.

We think it for the jury to say what was the design and object of Louis in making this false statement and keeping the fact from the Commercial Agency of this alleged indebtedness to his brother Gustave. In the case cited by ap-

pellant it was not shown that the conveyance made two years before was fraudulent; hence no bad intent could be inferred; but in this case the fact of the false statement repels the presumption of good intent, and the natural inquiry comes, Why should Louis S. Shauer have made this false statement and conceal from the Commercial Agency or the world this large alleged indebtedness to his brother? We cannot, perhaps, better illustrate the correctness in permitting this evidence to go to the jury than by referring to counsel's brief, page 10, folio 38, in citing from Bump, page 583, as follows:

"If the act or declaration was so long prior to the transaction in controversy that it does not tend to throw any light on it, the evidence is not admissable."

Did this false statement with reference to his financial condition made to the Commercial Agency and at the time it was made, under all the circumstances surrounding this case, throw any light on the transaction?

2d. In refusing to allow the plaintiff to read in evidence certain portion of the deposition of H. H. Nash, which was in answer to the following question:

Q. "State whether or not that check (check of $2,100) passed through the Chicago National bank in the ordinary course of business."

It may be inferred from argument of counsel for appellant that the three checks of $650, $270.87, and $2,100 respectively were excluded by the court and not allowed to be put in evidence. To correct any misapprehension upon this point, we respectfully call the Court's attention to Abs., p. 13, folio 51, as follows:

"The plaintiff then offered to read in evidence parts of the deposition of H. H. Nash, relating to the three checks, to the amount of $650, 270.87, and $2,100 respectively, *which checks were in evidence in the case* as exhibits, and showed

upon their faces to have been drawn by G. G. Shauer, plaintiff, upon the Chicago National bank in favor of Louis S. Shauer."

The first two checks named, as alleged by the plaintiff, had a tendency to show the payment of money from G. G. Shauer to his brother, Louis S. Shauer, making a part of the indebtedness in question, and the third check of $2,100 was the check which plaintiff claims to have passed to Louis S. Shauer as part of the consideration of the alleged transfer. On objection of the defendant the court refused, on the ground of being incompetent, to allow the plaintiff to read the answer of deponent relating to each of the above named checks in response to the following question:

"Q. You may state whether or not that check had all the appearance of having passed through the bank in the ordinary course of business."

It will be seen, then, from the foregoing statement that the "*checks were in evidence in the case.*"

And the error complained of by appellant is not to the introduction in evidence of the checks themselves, but in refusing to allow the witness Nash to answer this question: "*You may state whether or not that check has all the appearance of having passed through the bank in the ordinary course of business.*"

Hence the witness Nash was asked to give his opinion as to *all* the appearance of the checks as having passed through the bank. Nash was the cashier of the Chicago National bank, and it may be assumed that he was acquainted with the details of the ordinary transactions *of the* bank, viz., the Chicago National bank. The inquiry then comes, Why this objection, not to the introduction of the check, for it was in evidence, but as to its appearance, etc.?

"The objection to this question was sustained upon the ground that it appeared in evidence that the check had

passed through other banks than that of which witness was cashier, and it does not appear that the witness was familiar with the course of business of such other banks or their stamps or endorsements thereon so as to permit him to answer this general question."

Rec., p. 30.

How could the witness Nash testify that the check had *all* the appearance of having been paid. The check bore evidences of other endorsements than that of his bank. There were certain stamps upon it. There were evidences upon it that it had been in the hands of other banks than that of which he was cashier, and in the entire absence of any proof that the witness was familiar with the course of business of these other banks, that he had no knowledge of what these marks or stamps meant, how could the court have done otherwise than to sustain the objection, and it would surely have been error if the court had permitted this testimony to have been admitted in evidence.

We also think the question was leading, for the witness Nash was not asked to state what was the appearance, etc., of the check, but to say *yes* or *no* if it had *all* the appearance of having passed through the bank in the ordinary course of business.

The plaintiff further offered to read in evidence such parts of Mr. Nash's deposition showing what the marks and endorsements on the back of each of the checks indicated, how they were made, and by whom, and the court refused this, and he sustained the objection upon the same ground as that last before stated.

Rec., p. 30.

We think the rule is too elementary to require further argument.

We now pass to the third error complained of by appellant.

3d. In refusing to instruct the jury as requested by the plaintiff.

Appellant contends that the instruction given by the court upon the question of change of possession of the goods embraced in the transfer was not applicable to the facts shown in evidence. The evidence shows that Gustave G. Shauer reached Mitchell from Chicago on the 13th day of December, 1885. That evening the two brothers talked over the financial affairs of Louis, and Gustave concluded therefrom that Louis was financially embarrassed and owed more than he was able to pay.

On the following morning Gustave urged Louis to secure him by mortgage on the stock of merchandise, which Louis consented to do, but later in the day he declined; then Gustave proposed that he, Louis, should sell him goods to the amount of his debt, namely, $6,788. After talking the matter over between them it was, however, agreed that Gustave should take the entire stock of merchandise at eighty-five cents on the dollar, wholesale price, and deduct therefrom his demand of $6,788, and in addition thereto pay $2,100 in cash and the balance in his notes. Thereupon they commenced taking an inventory that afternoon, the 14th. The taking of this inventory occupied a day and a half; that it took a part of the forenoon of the 16th to complete the same.

The store was open the same as it had been at all times during the time this inventory was taken. *A bill of sale was made out immediately after the inventory was completed*—at about ten or eleven o'clock in the forenoon of December 16, 1885. Both parties then proceeded to the store, and Gustave there and then delivered to Louis his check for the $2,100 and his two notes for $1,247 each, and gave back to Louis his old note; thereupon Louis delivered to Gustave the bill of sale and the keys of the store; that immediately after this transfer Gustave opened an account with the First Na-

tional Bank of Mitchell; that he and Louis went to an insurance office in this city and had a policy of insurance transferred from Louis to Gustave, and then they went to dinner. Returning after dinner, they had three other policies changed, and then Gustave went to the store. He thereupon directed the clerk to go to his dinner, and when the clerk returned Gustave told him that he had bought the store.

He then made a contract with this same clerk to work for him and remain in the store. He directed the clerk to change the show in front of the store, which was done.

Gustave remained at the store most of the afternoon and waited upon some customers and made some sales. He prepared and left at two newspaper offices in Mitchell notices of this transfer, and asked for the patronage of the public, which was ordered published, and they appeared in the next issue of the papers; and he ordered letter-heads printed; he also ordered a sign for the store, with his name to be upon it; *that he filed for record the bill of sale.*

That during the afternoon Gustave requested Louis to assist in making the sale of a trunk; Gustave did not know the value of it. Louis was also there in the evening, when the levy was made.

Rec., pp. 27, 28, 29.

This, then, completed all the evidence of the alleged bargain, sale, transfer, and delivery of the property in controversy.

Counsel for appellant lays great stress upon the idea that because of what he claims to be the peculiar character of the articles sold and the peculiar circumstances of the case that all had been necessarily done that could be expected to make a complete immediate change of possession, so far as affecting the rights of the attaching creditors of Louis S. Shauer were concerned.

The property alleged to have been conveyed was a stock

of merchandise, consisting of such as is usually kept in a clothing store, and it was all contained in the one store building. The keys were placed in possession of Gustave before noon of the 16th. How much time would then be necessary, after having the keys in his possession ten or eleven hours before the levy, to apprise the public of such a transfer as the world and those dealing with the stock would at once know and recognize by coming in contact therewith that a change of possession had taken place; in other words, that a new owner was in possession thereof and that Louis S. Shauer had no longer any interest therein?

Appellant's theory is that the court should have instructed the jury to the effect that they were to take into consideration the character of the property transferred or the circumstances surrounding the transfer; in other words, that they should consider the time in which the transfer could be made.

This theory is only applicable, if at all, to the delivery of ponderous articles, and the authorities seem unanimous that the rule is different from that of other classes of personal property. These ponderous articles are generally substances that are not sheltered from the weather, but lie around loose upon wharves and in open lots apparently unprotected and without an owner.

Huge piles of saw-logs, lumber, cord-wood, pig iron, granite and stones in blocks, or heavy castings are the representatives of such property.

Lay *vs.* Neville, 25th Cal., 545.
Chaffin *vs.* Daub, 14th Cal., 384.

Chancellor Kent, in speaking of such bulky property, says a bill of sale of timber and materials of great bulk lying on the banks of a canal or marking the timber in this instance have been held to be a delivery sufficient to make the possession follow the right.

4th Kent, 500.

In the case of Lay *vs.* Neville, 25th Cal., 553, referred to by appellant in his brief, folio 69, respected a large quantity of wheat, of about 500 sacks. The purchaser of the wheat, without any delay whatever, procured some six to eight teams to haul the same, and that the plaintiff had removed a large portion of this grain, and was in the act of removing the balance with these teams at the time the levy was made. Under this state of facts the court says that it is not intended to make the sale void as against the creditors of the vendor unless the vendee shall perform in every case what might be in some cases an impossibility. The wheat contained in the sacks was of that ponderous character that it could not be removed immediately, but the possession in this case was a far better possession than that of the appellant, Gustave G. Shauer, for the plaintiff was engaged at the time the levy was made with six to eight teams actually hauling the grain away, and had at the time a larger portion of it hauled off. Counsel for appellant in his brief, on page 15, folio 58, cites the case of Stevens *vs.* Irwin, 15th Cal., 507. After a careful examination of this case we assume that it is not analogous to the case at bar. The instruction cited by appellant was given with particular reference to a "*continued change of possession.*" Not but what a change of possession such as the law required may have been had in this cited case, in the first instance, but after such delivery and transfer and the open, public, and notorious change of possession the California statute, to which ours is similar, requires that such change must be a "*continued change of possession.*" The court in this California case says that the word "actual" was designed to exclude the idea of a mere formal change of possession, and the word "continued" to include the idea of a mere temporary change, and that it never was the design of the statue to give such a meaning to the words "continued change of possession" as to require that the vendor should never have any control of or use of them. Hence the court remarks

that a reasonable construction must be given to this language.

Hence the remarks of the court in this connection as quoted by appellant as follows: "A reasonable construction must be given to this language," etc.

So we are at a loss to understand how it is possible for the case of Stevens *vs.* Irwin to be applicable to the question under consideration. Our question here is that there was no such change of possession in the very first instance as our statute contemplates and requires, namely, *an immediate change of possession.*

We think from the statement of facts themselves that the court was in duty bound not to make any qualification regarding the instructions given; that there were no such facts as would require him to charge the jury with reference to the time in which some visible sign must be given, or as to the character of this property transfered, or the circumstances surrounding it, and especially is this true in the absence of any request on the part of the appellant to so charge the jury.

The only request, if at all, by appellant upon this proposition was by way of the instruction that he asked, which we contend is not good law and was faulty.

Rec., pp. 31, 32.

"The acts that will constitute a delivery and change of possession of property sold, so as to protect the parties to the transaction as against creditors of the vendor, vary in different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case. It is not demanded that the purchaser, to take possession of the property, go to an *unusual expense* and do that which is contrary to the *usual course of business.* If the purchaser takes that possession which places him in the relation to the property which owners usually are to the like kind of property, and does all reasonable acts with such property to inform the public of such purchase, and if such acts are open, public,

and notorious, then such purchaser has done all the law requires him to do.

"You are to take into consideration the surrounding circumstances, time the purchaser had been in control of the property, the kind of property, and all those elements making up the conditions of this alleged sale, and if from these circumstances you find that Gustave G. Shauer took possession of the goods in question, accompanied with such plain and unmistakable acts of possession, control, and ownership as a prudent *bona fide* purchaser in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property, then you are instructed that he has done all the law requires of him in this particular."

The court is not in duty bound to give instructions not applicable to the case. It was not necessary to tell the jury that "the acts that will constitute a delivery and change of possession of property sold, so as to protect the parties to the transaction as against the creditors of the vendor, *vary in different classes of cases*, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case."

The court was asked to charge the jury: "It is not demanded that the purchaser, to take possession of the property, go to an *unusual expense* and do that which is contrary to the *usual course of business*."

One of the reasons assigned in refusing to give this instruction is the words "*an unusual expense*," and also "*contrary to the usual course of business*." There can be no definite rule with reference to the expenses, usual or unusual, in the transfer of possession of this class of property.

Section 2024 of our Civil Code makes every transfer of personal property conclusively presumed if made by the person having control thereof, if not accompanied by *immediate delivery* fraudulent and void against creditors.

The vendee cannot say that all I must do to obtain

possession, good as against creditors of the vendor, is to go to a *usual* expense in taking such possession.

The jury have no guide to tell them how far this *usual expense* is applicable in such a case as this. What one man's idea of *usual expense* might be to another it might seem quite *unusual* and extraordinary, and a third man might say, in the absence of proof, that he cannot tell what is or would be considered *usual* or *unusual*.

The same line of argument is equally applicable to the words "*usual course of business*." That part of the charge asked by appellant is faulty and misleading which says: "If the purchaser takes that possession which places him in that relation to the property which owners *usually are* to the like kind of property," etc. How could the jury determine what are the usual methods and relations to like property?

There is no rule in such case, no evidence being before the jury of any rule of like character.

Instructions must be framed with reference to the circumstances of the case on trial, and not be expressed in abstract and general terms, when such terms may mislead instead of enlightening the jury.

C. & A. R'y *vs.* Utley, 38th Ill., 410.

Appellant contends in this connection that in one of the instructions given at the request of the defendant, wherein these words are used:

"If the property in controversy was permitted to remain in the possession of Louis S. Shauer, then such transfer was fraudulent in law as to the creditors of Louis S. Shauer, notwithstanding the sale may have been to Louis' brother in good faith and for a valuable consideration"—

taken in connection with the entire instruction given, there can be no misapprehension; the jury could in no manner be misled thereby. The instruction, taken as a whole, had reference to an immediate delivery or change of

possession, and not as to what might have happened days after, so far as effecting the question of a *continued change of possession*. The instruction reads:

"You are instructed that the change of possession of the property in controversy in this case must not have been merely nominal and momentary. It must have been real, actual, and open and such as could be publicly known. If the property in controversy was permitted to remain in possession of Louis S. Shauer, then such transfer was fraudulent in law as to the creditors of Louis S. Shauer, notwithstanding the sale may have been made to his brother in good faith and for a valuable consideration."

Suppose that Louis S. Shauer had remained in the store the same as before, but acting, however, as the agent of his brother Gustave, that fact of itself would have in no manner been evidence of a transfer and an immediate delivery of the stock in controversy. In addition thereto there must have been some outward, visible, open, and notorious sign, indicating to persons dealing with the stock and doing business therein that a change of possession had taken place.

Taken in connection with the entire charge, the court correctly stated the rule. In harmony with this the court further explains the proposition (Rec., p. 33) as follows:

"In order to make this alleged sale and transfer from Louis S. Shauer to Gustave G. Shauer good in law as against the creditors of Louis S. Shauer, it was necessary that there should be an actual change of possession of the property sold from Louis S. Shauer to Gustave G. Shauer, and such sale must have been attended by such outward, open, and notorious signs of actual change of possession as could be seen and known at once to the public and to customers and to people dealing with the goods, and if you shall believe that Louis S. Shauer and his clerk after this alleged sale still remained in possession of the store, selling and handling the goods as before, and there were no such outward, visible, open, and notorious signs, indicating a change of pos-

session, then in law this sale was fraudulent and void and you must return a verdict for the defendant R. F. Alterton."

Taken as a whole, the charge in this respect is correct, for one instruction may be limited by others. While possibly one instruction, or an isolated portion of it considered alone and by itself, is too general, yet, if it is properly limited and explained by others, so that it is not probable it could have misled the jury, judgment will not be reversed on account thereof.

Carrington *vs.* P. M. S. S. Co., 1st Cal., 475.
Edwards *vs.* Cary, 60th Mo., 572.
Kendall *vs.* Brown, 86th Ill., 387.
Skiles *vs.* Caruthers, 88th Ill., 458.

The fourth proposition argued at length by appellant assumes that *actual notice* to the vendee is necessary in order to charge him with the fraudulent intent of the vendor.

In the case of Parker *vs.* Conner, 93d N. Y., 118, appellant relies largely upon this case as touching the question of actual notice on the part of the vendee.

The Court in charging the jury upon this point of actual notice in the case of Parker *vs.* Conner uses these words:

"Or did he, the vendee, have notice of facts in the case which would awaken the suspicions of a man of ordinary intelligence and caution," etc.

This brought the question squarely before the court of appeals upon the doctrine of constructive notice where a valuable consideration has been paid and the property taken into actual possession by the vendee.

Section 2023 of our Civil Code reads as follows:

"Every transfer of property or charge thereon made, every obligation incurred and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor

and their successors in interest and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

Sections 2106, 2107, 2108, and 2109 of our Civil Code defines notice to be of two kinds.

Actual notice consists in express information of a fact.

Constructive notice is notice imputed to a person not having actual notice.

Section 2109 reads as follows:

"Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself."

We now desire to recall the case cited by appellant in 93d N. Y., Parker *vs.* Conner, p. 118. It must be observed that the statute of New York upon this proposition goes farther than our Civil Code, sec. 2023.

2d R. S., 137, sec. 5, of New York, provides that its provisions—

"Shall not be construed in any manner to effect or impair the title of a purchaser for a valuable consideration unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor or of fraud rendering void the title of such grantor."

We take this quotation from the case of Stearns *vs.* Gage, 79th N. Y., 102, which is repeatedly cited by appellant. After quoting the above New York statute (79 N. Y., p. 107) Justice Miller remarks that—

"This plainly means that *actual notice* shall be given of the fraudulent intent or knowledge of circumstances which are equivalent to such notice."

The case of Parker *vs.* Conner, 93d N. Y., 118, is under this New York statute, which the court by way of *dictum*

construes as meaning that actual notice is necessary. In the case at bar the court instructed the jury, upon request of the defendant, as follows:

"Actual knowledge of any fraudulent intent on the part of the seller is not essential to render a sale void, and you are instructed that if the facts brought to the attention of Gustave G. Shauer were such as to awaken suspicion and lead a man of ordinary prudence to make inquiry and he fails to make such inquiry, then he is chargeable with notice of fraudulent intent and with a participation in the fraud, and it will be your duty to find for the defendant."

Rec., p. 33.

The court of his own motion upon this point instructed the jury as follows:

"Therefore should you find from the evidence that Louis S. Shauer was fairly and honestly indebted to his brother Gustave Shauer in the full amount claimed, which I believe is about $6,700, you will remember the exact amount, and that with the honest intention of securing such indebtedness he purchased the property in question without notice or knowledge of any fraudulent intent on the part of Louis S. Shauer to delay or defraud his creditors and without any intent on his own part to secure any interest in said property, present or future, to his brother Louis, and without any intent to delay or defraud the creditors of Louis S. Shauer, then he is entitled to recover whatever may have been the intent of Louis Shauer himself, for the intent of Louis can affect the plaintiff only in the case that he knew, had notice, or as a prudent man had knowledge sufficient from the circumstances to put him upon inquiry as to his brother's fraudulent intent."

Rec., p. 35.

Under our statute defining notice, and also under section 2109 of the Civil Code, with reference to the presumptions of notice, it will be observed that constructive notice is sufficient and this rule is sustained by a long line of authorities directly in point.

Wait on fraudulent conveyances, speaking upon the question of notice, page 490, says:

"A party in possession of certain information will be chargeable with a knowledge of all facts which an inquiry suggested by such information, prosecuted with due diligence, would have disclosed to him."

Booth *vs.* Barnum, 9th Conn., 286.
Shaw *vs.* Spencer, 100th Mass., 390.
Heaton *vs.* Prather, 84th Ill., 330.

Wait further says, page 491, sec. 371, discussing the rule laid down in Stearns *vs.* Gage, case (79 N. Y., 102):

"Some apparent dissensions have been introduced into this branch of the subject by a *dictum* of Miller, J., in Stearns *vs.* Gage, followed by Farley *vs.* Carpenter, and recently approved in Parker *vs.* Conner, 93d N. Y., 118. According to the court's own statement it could not be claimed that any question as to constructive notice was presented upon the trial. In Stearns *vs.* Gage it seems unfortunate, however, that the questionable sentences should have been embodied in the opinion. * * * The court says that the N. Y. statute plainly means that actual notice should be given of the fraudulent intent or knowledge of circumstances, which are equivalent to such notice."

In the case of Bartles *vs.* Gibson, 17th Fed. Rep., 297, Bunn, J., with whom Harlan, J., of the U. S. Supreme Court concurs, said:

"The defendant testified that he knew his brother was in some financial difficulty and that the trouble was of a financial character. Whether he knew all or not he knew enough to put him upon inquiry. If he had knowledge of facts sufficient to excite the suspicions of a prudent man and put him on inquiry, *he made himself a party to the fraud.*"

In Singer *vs.* Jacobs, 11th Fed. Rep., 561, the court says:

"If facts are brought to the knowledge of a party which would put him as a man of common sagacity upon in-

quiry, he is bound to inquire, and if he neglect to do so he will be chargeable with notice of what he might have learned upon examination."

The same rule is also held in Wilson *vs.* Prewett, 3d Wood, 641; court says:

"It has even been held that the means of knowledge by the ordinary diligence amounts to notice."

In David *vs.* Birchard, 53d Wis., 495, where a mortgage was attached, the court says:

"The knowledge need not be actual, positive information or notice, but may be inferred from the knowledge of the mortgagee of facts and circumstances sufficient to raise such suspicions as would put him on inquiry."

In De Witt *vs.* Vansickle, 29th N. J. Eq., case, 215, the court says:

"A persons who deals in the avails of a scheme to defraud creditors to keep what he gets must not only pay for it, but he must be innocent of any purpose to further the fraud even to protect himself; *actual notice need not be shown.* If the purchaser had before him at the time of his purchase facts and circumstances from which a fraudulent intent, either past or present, on the part of the vendor is a natural and legal inference, or such facts or circumstances of suspicion as would naturally prompt a prudent mind to further inquiry and an examination which if pursued would lead necessarily to a discovery of the corrupting facts, he is chargeable with notice."

In Prewitt *vs.* Wilson, 103 U. S., 24, the court observed that the grantee to vitiate the transfer must be *chargeable with knowledge* of the intention of the grantor, not that explicit and direct proof of actual knowledge must be adduced. The vendee cannot shut his eyes, but must look about him and inquire. Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is also notice of everything to which it is afterward

found such notice might have led. When a person has sufficient information to lead him to a fact he shall be deemed conversant with it. (Wood *vs.* Carpenter, 101 U. S. 141.) While suspicion may not be sufficient, yet a knowledge of facts calculated to produce such a belief in the mind of an ordinary intelligent man would avoid the security.

Grant *vs.* National Bank, 97th U. S., 82.
Barbour *vs.* Priest, 103 U. S., 297.
Stucky *vs.* Masonic Savings Bank, 108 U. S., 75.

In the case of Temple *vs.* Smith, 13th Neb., 513, "where a purchaser has notice of the fraudulent intent of a person from whom he purchases or has notice of such facts as would put a man of ordinary prudence upon inquiry which would have led to a knowledge of a fraudulent purpose of the person selling the goods, he is not a *bona fide* purchaser.

Zuver *vs.* Lyon, 40th Iowa, 510.
Jones *vs.* Hetherington, 45th Iowa, 681.
Bradford *vs.* Beyer, 17th Ohio State, 388.
Bollman *vs.* Lucas, 36 N. W. Rep., 465.
Biddinger *vs.* Willard, 10th Atl., 202.
Wells *vs.* McMahon, 18th Pac., 73.

Our own Supreme Court in the case of Gress *vs.* Evans, 1st Dak., 399, says:

"Actual notice of a prior unrecorded conveyance or of any title, legal or equitable, to the premises or knowledge and notice of any facts which would put a prudent man upon inquiry impeaches the good faith of a subsequent purchaser. * * * Constructive notice is notice imputed by the law to a person not having actual notice, and every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself."

This is in keeping with our statute itself. From an examination of all these cases, and many more, that bear directly in point, there is no distinction made with reference to an actual consideration having been paid.

It seems difficult, then, to assign any reason why the doctrine of constructive notice, especially in view of our own statute and the decision of our own court, if it has any application at all, should not also be equally applied in a case in which adequate consideration has been given. Appellant assumes that if a good consideration has been shown, then in order to charge the vendee with notice it must require *actual notice*. From the light of all the authorities we must conclude where the fraudulent intent is constructively present proof of consideration will not save the transaction. It is merely a fact, a piece of evidence, tending, among other things, to establish a want of notice; but it clearly had no such controlling effect, and bears no such relation to the transaction as to justify the court in disregarding as the basis of a finding of notice proof of facts sufficient to excite inquiry or suspicion, or to constitute constructive notice; indeed, actual or pretended payment of consideration is almost a necessary incident to a fraudulent transaction, and often serves as a convenient covering for fraud.

Appellant in his fifth proposition assumes that the court erred in giving the instruction asked by defendant, and also upon his own motion, touching the question of fraudulent intent on the part of the vendee when he accept the transfer as a creditor for the sole purpose of obtaining satisfaction of his own debt.

We agree with appellant that, although the vendor may have intended to secure his brother, and thereby defeat his other creditors, that he had the right to prefer one creditor over another, and that such creditor does not violate any principle of the statute when he takes payment or security for his demand, though others are thereby deprived of all

means of obtaining satisfaction of their own equally meritorious claims, and though he may be aware of the intent of the debtor to defeat the collection of them.

The instruction asked by defendant of which appellant complains is as follows:

"You are instructed that a conveyance or sale of property made with the intent, on the part of the seller, to either hinder or delay or defraud a particular creditor in the collection of his debt is void as against all the creditors of the seller if the intent be known to, or participated in, by the purchaser, although made for a good and valuable consideration."

Rec., p. 32.

The answer of the defendant alleges that the transfer from Louis to his brother Gustave was fraudulent as to the creditors of Louis, and that it was understood and agreed by and between Louis and Gustave that he, Gustave, should claim to be the owner of said property, and that he purchased and paid for the same, and by thus doing they would prevent and delay the creditors of Louis S. Shauer from making their debts, and that Gustave accepted the same with the express purpose of assisting and conniving with his brother for the sole purpose of cheating and defrauding the creditors of Louis, and that Gustave did not in any manner pay for the said goods.

Rec., pp. 5, 6.

The plaintiff attempted to show that the alleged indebtedness from Louis to Gustave was *donat fide*. This was one of the main questions at issue. The various checks that we have heretofore referred to were offered by the plaintiff for the purpose of showing that Louis was actually owing his brother Gustave, and that Gustave was a creditor. Alluding to this, appellant in his brief says that—

"Each and every transaction of this nature favorable to the plaintiff was attacked by the defense as fictitious."

If the indebtedness was fictitious, as alleged by the defendant, then Gustave was not a creditor, and the rule that one creditor has the right to prefer another, even to the exclusion of all the rest, would not be applicable.

The plaintiff offered proof tending to show that Louis at the time of the alleged transfer was owing Gustave the sum of $6,788, and that Gustave purchased the entire stock at 85 cents on the dollar, wholesale price, which made the value of the property, at their own figures, $11,382, and the balance of the purchase price, after deducting the alleged indebtedness of $6,788, was $4,594, for which Gustave gave his checks for $2,100 and his two notes for $1,247 each. Hence at the 85 cents on the dollar Gustave gets $4,594 worth of property more than satisfying his alleged indebtedness.

Rec., p. 28.

Appellant does not claim that the verdict of the jury was contrary to the evidence. If it be true that Gustave was not a creditor, then the instruction asked by the defendant was good law; but suppose, upon the other hand, there was some evidence that Gustave was a *bona fide* creditor, then the court, of his own motion, gave the plaintiff every benefit. He says:

"Therefore, should you find from the evidence that Louis Shauer was fairly and honestly indebted to his brother, Gustave Shauer, in the full amount claimed, which I believe is about $6,700—you will remember the exact amount—and that with the honest intention of securing such indebtedness he purchased the property in question without notice or knowledge of any fraudulent intent on the part of Louis Shauer to delay or defraud his creditors and without any intent on his own part to secure any interest in said property, present or future, to his brother Louis and without any intent to delay or defraud the creditors of Louis Shauer, then he is entitled to recover, whatever may have been the intent of Louis Shauer himself, for the intent of Louis Shauer can affect the plaintiff only in case he knew, had

then the transaction would not be valid. The distinction is between a transfer made solely by way of preference of one creditor over others and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor or to delay the creditors in the collection of their debts.

Banfield *vs.* Whipple, 96 Mass., 13.
Barr *vs.* Hatch, 3 Ohio, 527.
Giddings *vs.* Sears, 115 Mass., 505.

While the law permits an insolvent debtor to make choice of the persons he will pay, it denies him the right in doing it to contrive that other creditors shall never be paid.

Drury *vs.* Cross, 7 Wall., 299.
Gordon *vs.* Clapp, 113 Mass., 335.

The debt of a preferred creditor cannot be used as a colorable consideration to screen and protect the debtor's property from creditors' claims or to delay, hinder, and embarrass them in the enforcement of their claims.

Stoddard *vs.* Butler, 20 Wend., 507.
Bunn *vs.* Ahl, 29 Penn., 387.
Henderson *vs.* Henderson, 55 Mo., 534.
Smith *vs.* Hardy, 36 Wis., 417.
Kirtland *vs.* Snow, 20 Conn., 23.

Had this instruction been given as asked the jury would have understood that Louis had the right as a failing debtor to prefer his brother or secure him with goods obtained from another creditor, and the preference could be given for any lawful demand held by his brother, and the *secret motives which prompted the preference are immaterial.*

This instruction virtually told the jury that such preference was good, irrespective of good faith or whether Louis Shauer designed to secure some benefit or advantage therefrom or to delay other creditors or to use the debt of Gus-

tave as a colorable consideration to screen and protect his property from their claims or to hinder or delay them in the enforcement of their demands.

Supposing this alleged preference was tainted by a secret trust, a mere temporary arrangement to prevent a sacrifice of the property, with a secret reservation of an interest to Louis, can it be argued for a moment, then, "*that the secret motives which prompt the preference are immaterial*"?

This instruction should have told the jury that the *secret motives which prompt the preference are immaterial* if the preference was in good faith to secure a *bona fide* indebtedness and not a cover for a fraudulent transaction and not made with a design to secure some benefit or advantage therefrom to Louis S. Shauer or to delay the creditors in the collection of their debts, for creditors are not allowed to gain a preference by means of a secret undertaking to hold a part of the property for the benefit of the debtor, for the law looks with great jealousy upon the manner of giving preferences and denounces all departures from good faith and requires that the parties shall not secure any covert advantage to the debtor in prejudice of his creditors; for if there was any such secret understanding the transfer will be void, although the creditor is not influenced by any fraudulent or improper motive, but makes the best arrangement he can to secure the debt.

Mecker *vs.* Harris, 19 Cal., 278.
Reynolds *vs.* Welch, 47 Ala., 200.
Humphries *vs.* Freeman, 22 Tex., 45.

We must not overlook the entire charge. Upon examination we find the court gave, at the request of the appellant, this instruction:

"If you find from the evidence that the plaintiff knew of the insolvency of Louis S. Shauer, and that he was unable to pay his debts, and that the payment of his (the plaintiff's) debt would deprive other creditors of their claims, this mere

knowledge on his part would not make this sale in question fraudulent."

Appellant further contends that the court erred in refusing to give the following instruction:

"If you find that Gustave Shauer purchased the goods in question from his brother Louis at a fair valuation, and that the consideration for such purpose was in part the payment and satisfaction of a legal claim or demand which Gustave then held against Louis, and, further, that Louis made it one of the conditions of paying and satisfying Gustave's demand that the latter should take goods in excess of the amount of his claim, which condition Gustave, in good faith, believed that Louis intended to insist upon, then, under these circumstances, the transfer to Gustave is not invalidated by the fact, if such you find was the fact, that he paid the balance in money and his own notes, and this is true, notwithstanding you believe that Gustave at the time *knew that the purpose of Louis* in insisting upon such condition was to enable him to prefer other relatives to whom he was indebted to the exclusion of his creditors not relatives, or even to place *such balance beyond the reach of his other creditors.*"

Rec., p. 32.

This instruction was asked by appellant upon the theory that a creditor in obtaining payment of his claim may purchase property in excess of his debt if reasonably necessary for attaining the lawful purpose of securing his own debt.

We think the court properly refused the giving of this instruction.

The testimony showed the excess of goods alleged to have been purchased by Gustave to have been of the value of $4,594 over Louis' alleged debt to Gustave. Of this $4,594 $2,494 was evidenced by two notes of Gustave to Louis for $1,247 each, due in *sixty days and one year respectively.*

In the case of Elser *vs.* Graber (Tex.), 6 S. W., 560, was where a merchant informed his father-in-law, whom he owed $1,800, that he was insolvent, and the two agreed that

the father-in-law should take the stock at $2,500, giving his note, due twelve months after date, for the difference between the purchase price and his claim, which agreement was carried out, and the father-in-law proceeded to dispose of the goods; held that as the necessary consequence of the father-in-law's taking property of value considerably in excess of his claim and giving his note for the surplus, payable on a long credit, was to delay and hinder other creditors as to this surplus, and the transaction was fraudulent in law, and the father-in-law could not set up that his intent was fair and that the debtor agreed to appropriate the surplus to the payment of the other creditors.

We have italicised those words in the instruction refused by the court that we especially desire to allude to. The instruction asked had the effect of telling the jury that it was immaterial how much goods were taken or what the value of them was over and above a sum sufficient to pay Gustave's alleged debt, and all that was necessary to protect Gustave was that he believed Louis made it one of the conditions in paying and satisfying Gustave's demand that he, Gustave, should take all the goods and entire stock, and that Louis intended to insist upon it, and this is true if Gustave even "*knew that the purpose of Louis*" in insisting upon such condition was to place "*such balance of his stock beyond the reach of his other creditors.*"

It seems to us that the authorities cited by appellant defeat this instruction. Bump says (p. 194) that the excess must be reasonably necessary and for the lawful purpose of satisfying an actual debt, and the excess does not of itself invalidate the transaction *unless there are other circumstances tending to show a fraudulent intent on the part of the purchaser.*

In the case of Buermann *vs.* Van Buren, 44 Mich., 496, cited by appellant, the court starts out with the proposition that in order to make the purchase of such excess over and above sufficient to pay the creditor's debt *the purchase must have been in good faith in payment of an actual debt.*

Further, we do not understand that the question of the purchase of the excess was before the court at all. The question that the court was called upon to decide was regarding the proposition of taking property in satisfaction of an actual debt, for the court says:

"When a person buys for the sole purpose of obtaining payment of an honest debt, the circumstances that the seller intends to hinder or defraud his creditors does not make the sale void. It must be made out that the buyer participated in the fraudulent intent."

Appellant cites the case of Hirsch *vs.* Richardson, 3 S. Rep., 569. Upon examination of this case it will be seen that the question of purchase of excess over and above the creditor's debt was in no manner before the court, and the quotation of counsel for the appellant is merely a *dictum* of the *court*.

Appellant says the court erred in giving, of his own motion, the following charge:

"Transfers to one's wife or members of his family are carefully scrutinized, experience having taught that such conveyances are more frequently fraudulent than transactions between strangers or those not intimately acquainted."

Rec., p. 34.

There was no error in this instruction. It has long been held that transfers between relatives were justly regarded with suspicion.

Burt *vs.* Timmons, 2 S. E. Rep., 780, it was held that a transfer of property, either directly or indirectly, by an insolvent husband to his wife is justly regarded with suspicion, and unless it clearly appears it was entirely free from any wrong intent to withdraw it from the husband's creditors it will not be sustained unless she overcomes the presumption of fraud by affirmative proof.

Livey *vs.* Winton, 4 S. E. Rep., 451, holds that transactions between husband and wife, between whom there exists a

strong natural motive to provide for each other at the expense of creditors, when sought to be impeached as fraudulent, require less proof to show fraud, and, on the other hand, when a *prima facie* case is made much stronger proof to show fair dealing than would be required if the transaction was between strangers.

Bump says, page 54, that sentiments of affection commonly generate this confidence and often prompt relatives to provide for each other at the expense of just creditors, for they are the persons with whom a secret trust is likely to exist. Whenever this confidential relation is shown to exist the parties are held to a fuller and stricter proof of the consideration and of the fairness of the transaction.

Wait on Fraudulent Conveyances, page 335, says:

"*Relationship of the parties is calculated to awaken suspicion and the transaction will be closely scrutinized.*"

Forsyth *vs.* Mathews, 14 Pa. St., 100.
Harrell *vs.* Mitchell, 61 Ala., 271.
Engraham *vs.* Pate, 51 Ga., 537.
Sherman *vs.* Hogland, 73 Ind., 473.
Fisher *vs.* Shelver, 53 Wis., 501.
Seitz *vs.* Mitchell, 94 U. S., 580.

May's Fraudulent Conveyances, p. 236, says:

"A settlement or other conveyance in favor of a near relative is open to more suspicion than one to a mere stranger, inasmuch as it is more likely to be intended, not as a real transfer of property by which the donor puts it out of his own reach, but a feigned and collusive arrangement by which it is secretly understood that the donee shall hold the property against the claims of creditors or purchasers and still let the donor receive benefits from it."

Fisher *vs.* Herron, 34 N. W. 365, says:

"Transactions between relatives whereby property is transferred from one to another in payment of an alleged past-due indebtedness, by reason of which creditors are de-

priced of their just dues, will be scrutinized very closely and the *bona fides* of such transactions must be clearly established."

At the request of appellant the court gave instructions covering this question fully, so far as the relationship of the vendor and vendee existed, and the plaintiff, appellant, cannot complain, for, as requested by him, the court gave the following instructions:

"If you find in this case that Louis S. Shauer made a sale of these goods to Gustave G. Shauer, it will be presumed that such sale was made in good faith and with honest intentions. In the absence of proof to the contrary the jury have no right to question the validity of such sale. If the evidence should be equally balanced, then the defendant must fail as to the fraud alleged."

Rec., p. 7.

"The mere sale by a party of his stock of goods to a relative is not a badge of fraud. If such sales were fraudulent in themselves it would be impossible for family connections to aid each other in case of financial embarrassment without danger of being placed in a false position and losing the entire sum loaned. Under this rule, if Louis S. Shauer owed his brother, Gustave G. Shauer, a just debt, he had the same right to transfer his property to this brother in payment of this debt as he would have had to transfer the same property to any one of these attaching creditors in payment of his claim."

Rec., p. 9.

"If you find from the evidence that the plaintiff knew of the insolvency of Louis S. Shauer, and that he was unable to pay his debts, and that the payment of his, the plaintiff's, debt would deprive other creditors of their claims, this mere knowledge on his part would not make this sale in question fraudulent."

Rec., p. 7.

Appellant complains because the court refused to give the following instruction:

"It is alleged by the defendant in this action that this transfer was fraudulent and void. You are expressly instructed that the burden of proving this alleged fraud is upon the defendant and he must do so by a fair preponderance of evidence. In this connection you are instructed that the law presumes that all persons transact their business honestly and in good faith until the contrary appears from a preponderance of the evidence. Fraud will never be imputed when the facts upon which the charge is based *are or may be consistent* with honesty and purity of intention."

Rec., p. 7.

In the giving of instructions the court must give such as are applicable to the case. Was this instruction good law and applicable to the case? We think not. Take the words in italic and examine them carefully. The instruction says:

"Fraud will never be imputed when the facts upon which the charge is based *are or may be consistent* with honesty and purity of intention."

From the testimony before them the jury must determine what are the facts. After the jury had heard the facts the court was asked to tell them if those facts *are or may be consistent* with honesty and purity of intention. Fraud could not be imputed in this case. The jury had two opportunities upon this question of "honesty and purity of intention." One was, *Are* the facts in the case consistent with honesty and purity of intention? or, secondly, *May* the facts be consistent with honesty and purity of intention?

The court refused this other instruction:

"If the jury believe that the circumstances attending the sale and transfer in this case of the goods and property in question from Louis S. Shauer to Gustave Shauer, the plaintiff, are consistent either with a fraudulent intent or with honesty of purpose, then the jury will not be justified in in-

terring that such transaction was fraudulent. The burden of proof, so far as showing the purchase of goods in question to be fraudulent, rests upon the defendant, and in order to defeat this action it is incumbent upon the defendant to satisfy you by a *clear* preponderance of evidence that such transfer was not taken by the plaintiff, Gustave Shauer, for the purpose of obtaining payment of a legal demand which he then held against his brother, Louis S. Shauer."

Rec., p. 7.

This instruction asked by plaintiff goes to the question of burden of proof, and it says that "in order to defeat this action it is incumbent upon the defendant to satisfy you by by a *clear* preponderance of evidence," etc.

We assume that courts have never gone so far, especially in civil cases, as to tell a jury how far and to what extent the testimony must preponderate by telling them it must be a *clear* preponderance. The greatest has been to tell them that a *fair* preponderance is only necessary, while many contend it better not to attempt any qualification whatever.

Furthermore, we doubt if the burden of proof in this case rests with the defendant to the extent claimed by appellant in instructions asked.

The vendor and vendee were brothers and the *bona fides* of the transaction questioned, and it became necessary for Gustave Shauer, in order to protect himself as against these attaching creditors, to show a good and valuable consideration as well as the *bona fides* of the sale and purchase from his brother.

"The burden of proof is upon the vendee when it becomes necessary to establish the *bona fides* of the transaction."

Lane *vs.* Starkey, 18 N. W. Rep., 47.

"It is well settled that the burden of proving a valuable consideration is upon the purchaser when proof of that fact becomes necessary for his protection against either creditors or subsequent purchasers."

Abbot's Trial Evidence, 448, 449.

We assume that it was necessary for Gustave G. Shauer to have shown by a preponderance of the evidence that his purchase from his brother Louis was *bona fide* and for a valuable and adequate consideration. Not until he had done so was it necessary for the defendant to show fraud, and these instructions should have been qualified in any event to that extent.

Suppose Gustave Shauer had brought his action for replevin and not for conversion and defendant's answer denied his ownership and alleged fraud in his pretended purchase and justified under the various warrants of attachments. We contend it would have been necessary for him to have shown the *bona fides* of his purchase, and the burden would have fallen upon him to have done so in the first instance, and not until he had done so would the burden have rested upon the defendant to show the fraud.

"When a wife claims property seized on execution against her husband by purchase with means of her own, the burden is on her to prove that she purchased the property for a valuable consideration, paid out of her separate estate, but, that being shown, the burden of proving such conveyance to have been made in fraud of her husband's creditors is upon the party attacking it."

Buckley *vs.* Walker, 32 N. W. Rep., 773.

"Fraud as against creditors where the wife claims the property she must show by a preponderance of evidence that she is a *bona fide* purchaser for value."

Kailer *vs.* Wagner, 12 N. W. Rep., 754.

Thompson *vs.* Loening, 14 N. W. Rep., 168.

It seems to us, however, that appellant cannot complain, for the court gave the following instruction at his request:

"If you find in this case that Louis S. Shauer made a sale of these goods to Gustave G. Shauer, it will be presumed that such sale was made in good faith and with honest intentions. In the absence of proof to the contrary the jury

have no right to question the validity of such sale." *If the evidence should be equally balanced, then the defendant must fail as to the issue thereof.*

Respectfully,

In conclusion we submit that considering the entire charge of the court and all the instruction taken together the jury were not misled and the law was correctly stated. The court exercised much care in all his rulings and instructions to the jury. The plaintiff was given every opportunity of a fair and impartial trial in the court below, and no sufficient reasons are assigned why the judgment of the court should be reversed and a new trial granted.

PHILLIPS & PRESTON,
Attys for Respondent.

Malcolm M. Leech
of Counsel

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 174.

GUSTAVE G. SHAUER, PLAINTIFF IN ERROR,

vs.

R. F. ALTERTON, DEFENDANT IN ERROR.

MORGAN H. BEACH,
For Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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GUSTAVE G. SHAUER, PLAINTIFF IN ERROR,

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R. F. ALTERTON, DEFENDANT IN ERROR.

Brief of Morgan H. Beach for Defendant in Error.

On the morning of December 15, 1885, Louis Shauer executed and delivered to his brother Gustave a bill of sale of his store and entire stock of goods in Mitchell, Dakota, and gave up the keys of the premises. Twelve hours later the defendant in error, sheriff of the county, levied on the property as belonging to Louis Shauer, under warrants of attachment issued at the suit of his creditors, charging that he had disposed of his effects with intent to defraud them.

Gustave Shauer brought conversion against the sheriff; the action was tried before a jury in the district court of Davison county, Dakota; verdict and judgment were for defendant. On appeal to the supreme court of the Territory the judgment was affirmed, and the writ is now here with twenty-five grounds of error.

Gustave had been in Mitchell barely three days before the attachments were levied. He had arrived on Sunday, having made the trip from Chicago, where he carried on business as a druggist, to see why his brother had not sent him certain promised moneys. Gustave needed a large amount of money, because he contemplated purchasing another drug store, and he had so informed Louis, who had visited him in Chicago in the preceding September. Louis' business was that of a clothier and furnisher, and he was then laying in his fall and winter stock. Gustave claimed that Louis owed him more than $8,000 for loans and advances since March 10, 1880.

Gustave, after trusting his brother to the extent of $8,000 for upwards of five years, has a conversation with him in September, 1885, then a correspondence, and finally makes the journey of several hundred miles from Chicago to Mitchell "to see about the matter."

He had a conversation with Louis after his arrival. He learned from this that Louis was insolvent. The next day he urged Louis to secure him. Louis consented and then refused.

Gustave then proposed that Louis should sell him goods to the extent of his demand.

Louis refused unless Gustave would take the entire stock.

"After talking the matter over" it was agreed:

1st. That Gustave should take the entire stock.

2d. That the alleged debt of five years' standing should be part of the consideration.

3d. That a check for $2,100 should be another part.

4th. That two notes of $1,247 each should complete the consideration, one of which should be at *60* days and the other at one year.

5th. That the stock should be valued at 15 per cent. below wholesale invoice, and on this basis the entire property was valued at $11,382.

The warrants held by defendants in error, under which he justified, aggregated more than $10,000, representing purchases made upon credit by Louis Shauer since September, 1885, from Chicago merchants.

Thus Gustave, advising with his brother, finds him bankrupt, and instead of collecting half his debt for the purpose of enlarging his own business, he advances as much more to his brother in a form which that brother can most easily manage.

In lieu of extended usefulness as an apothecary, he is found several hundred miles away installed in a clothing business worth $11,382, at a valuation 15 per cent. below wholesale price—all decided upon and done in forty-eight hours.

Beyond passing the bill of sale and the keys of the store, there was nothing in the way of actual delivery at or within the store. Gustave was quite active away from the store in matters which involved only a few pen strokes, viz., assign-

ments of insurance policies, orders for stationery and sign and advertisements in newspapers, a bank account, and *recording the bill of sale.* His sole move of recent proprietorship was to hire anew Louis' old clerk, and to direct him to change the show in part of the store—a device not uncommon in the clothing business and not peculiarly indicative of any disturbance or change within.

Louis had assisted in the sale of an article during the afternoon, and he was present when the defendant in error made his levy.

Under the Dakota statute every transfer of personal property (with certain irrelevant exceptions) is *conclusively* presumed, if made by a person having at the time the possession or control of the property and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing transferred, to be fraudulent and therefore void against those who are his creditors while he remains in possession, &c.

Under these facts and this statute it is believed that substantial justice was reached in the jury's verdict. As an (1) actual fraud, there was evidence tending to show:

(*a*) Insolvency of vendor.

(*b*) Knowledge of his insolvency by vendee, who was his brother.

(*c*) The transfer covered everything.

(*d*) And the suit was so on the heels of it that it might be said to be made "pending the writ."

(*e*) There was no actual delivery.

(*f*) The vendor and his clerk continued about the premises, the presence of the former being entirely unexplained.

(*g*) There was no outward and visible sign of any inward change.

(*h*) The price was 15 per cent. below the *wholesale* price.

(*i*) The credit was quite long.

(*k*) The vendee's alleged aims and purposes were so radically and violently changed in such a short time as to afford strong internal evidence either of preconcert or subterfuge.

And on (2) constructive fraud under the statute:

(*a*) No immediate delivery.

(*b*) Nor actual change of possession.

(*c*) And the person who had the control apparently remained in possession.

I.

The first assignment, viz., the court's exclusion of the answer of the witness in the deposition, cannot be considered here, because neither the answer itself nor its substance is given. It does not affirmatively appear, therefore, that the ruling affected or might have affected the case.

Packet Co. *vs.* Clough, 20 Wal., 543.
R. R. Co. *vs.* Smith, 21 Wal., 261.
Thompson *vs.* Bank, 111 U. S., 529.

The checks were already in evidence (Rec. p. 29).

But if considered the ruling below was correct. Conceding fully the general nature of the office of cashier, it is denied that this implies personal knowledge of every daily happening in the bank's business.

The fact was capable of specific proof, and its existence was not to be surmised from appearances.

II.

Nor can the second assignment be sustained. The ground of exception, while not expressly stated, would seem to be that the objectionable communication was not shown to have come to the knowledge of either plaintiff or attaching creditors.

The plaintiff is confined to the specific ground of exception.

Noonan *vs.* Caledonian Co., 121 U. S., 400, and cases cited.

On the plaintiff's theory of the existence of the debt its concealment by Louis Shauer for the obvious purpose of maintaining fictitious credit is admissible to show the inception of a fraudulent intent.

That of the vendee need not be synchronous, and may be shown by participation in the final designs of which this particular bit of evidence is the germ.

The bill of exceptions does not state that this was all the evidence of fraudulent intent; and, *non constat*, but that the development from this beginning may have been shown.

III–XXV.

The remaining assignments of error go to instructions rejected and given and the court's charge.

A consideration of the charge, taking its whole scope and bearing, construing it as an entirety and as it must have been understood by court and jury, will show that the case was satisfactorily and correctly covered.

Maguire *vs.* Thompson, 7 Pet., 390.

It has been repeatedly decided by this tribunal that no court is obliged to give instructions in the language and form in which they are asked. If those given sufficiently cover the case and are correct, the judgment will not be disturbed, whatever those may have been which were rejected.

Ry. Co. *vs.* McCarthy, 96 U. S., 258.

It was at one time attempted to lay down rules that particular things were indelible badges of fraud, but in truth every case must stand upon its own footing, and the court or the jury must consider whether, having regard to all the circumstances, the transaction was a fair one and intended to pass the property for a good and valuable consideration.

Hale *vs.* Met. Om. Co., 28 L. J., ch. 77.

Of instructions No. 1 and No. 4 asked by plaintiff (Rec., pp. 7 and 8) and refused, it is sufficient to say that their principles are correctly given in instruction No. 2 (Rec., p. 7) granted by the court.

Each is objectionable as requiring the court to define the degree in which the evidence should preponderate.

If it does preponderate it outweighs, overcomes, disproves that opposed to it. This is all that can be required.

11 Am. St. Rep., 759, note.

Of instruction No. 5 (Rec., p. 8) asked by plaintiff and refused by the court, the objectionable feature is that "the secret motives which prompt the preference are immaterial. When the act is right no secret feelings can change its character."

What is this but "as if a man be indebted to five several persons in the sum of £20 and hath goods to the value of

£20 and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them that the donee shall deal favorably with him in regard to his poor estate."

"This shall not be called *bona fide* within the proviso." (Twyne's case, 1 Sm. L. Cas.) The instruction, further, is argumentative, loses sight of the qualification of all preferences that they must be *bona fide*, and would distinguish between the motive and the act, when both must be regarded in considering the result.

Instruction No. 6 (Rec., p. 8) should have the same limitation of good faith. The honesty of the debt is not the sole requisite.

Instruction No. 7 (Rec., p. 8) is meaningless.

In regard to instruction No. 9 (Rec., p. 9.) The qualifications which the plaintiff would put upon delivery, as delivery appears from the testimony, practically annihilates the statute. Where apparent strictures have been placed on the statute there have been facts easily distinguishable from the case at bar. In 14 Cal., 384, the subject-matter was unharvested hay, covering one hundred and fifty acres in swaths, winrows, and stacks. In 25 Cal., 553, five hundred bags of wheat, and so on.

In all these cases there was a complete separation between the *vendor* and thing sold.

The vendor was not about the premises. Where it was not possible for him to deliver the thing sold, he at least took himself away from it.

It was in every case such a transfer of possession and control as evinced the purpose and effect of putting the goods out of his hands.

How are the jury to decide upon what is in such cases the usual course of business, or usual expense, or the usual relation to that kind of property?

The court left it to the jury to find whether there had in point of fact been such a delivery as the plain import of the statute required.

The tenth instruction prayed by plaintiff was properly refused.

Of the exceptions taken to the prayers granted at the defendant's instance two need only be seriously regarded. The objection that actual notice is required to charge a purchaser for valuable consideration, and the objection on the score of relationship.

Constructive notice is sufficient.

Singer *vs.* Jacobs, 11 Fed. Rep., 561.

Dartles *vs.* Gibson, 17 Fed. Rep., 279 (Mr. Justice Harlan sat in this case).

Clements *vs.* Moore, 7 Wall., 312.

Phillips *vs.* Reitz, 16 Kans., 396 (Mr. Justice Brewer).

McDonald *vs.* Garret, 30 Kans., 693.

The contrary decision of the New York court of appeals in Parker *vs.* Conner, directly variant with the earlier trend of opinion in that State, may be confined to the statute in force there.

Under it possession remaining with vendor is only *prima facie* fraudulent.

The vendee may show on his part good faith and no intent to defraud.

The statute therefore treats the question as one for the jury.

And a purchaser for valuable consideration is expressly exempt from the operation of the act unless it appears that he had previous notice of his grantor's fraudulent intent.

This notice, Parker *vs.* Conner establishes, must be actual.

That is to say, the jury must find the fact of notice as they must find the fact of fraud.

Under the doctrine of constructive notice they do not find the ultimate fact: the law conclusively presumes it.

On the other hand, the Dakota statute is quite different.

It establishes fraud in law.

It excepts no class, makes no conditions, and is prohibitive of transactions coming within its terms.

Valuable consideration, actual honest intent, want of actual knowledge, are of no avail against the clearly defined policy of the statute.

A due regard to its object, to legislative definition, and to the general authorities on the effect of constructive notice must uphold the instruction.

The court merely tells the jury that the fact of relationship may be considered by them in connection with other facts.

Statute of New York, 2 R. S., 137:

§ 4. Every sale made by a vendor of good in his possession or under his control, unless the same be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things sold, shall be presumed to be fraudulent and void as against creditors, &c., * * * and shall be conclusive evidence of fraud unless it be made to appear on the part of the person claiming under such sale that the same was made in good faith and without any intent to defraud.

§ 5. The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for valuable consideration unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor or of fraud rendering void the title of such grantor.

Statutes of Dakota (Civil):

§ 2023. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor and their successors in interest and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

§ 2024. Every transfer of personal property other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon other than a mortgage, when allowed by law, and a contract of bottomry or respondentia is conclusively presumed if made by a person having at the time the possession or control of the property and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void against those who are his creditors while he remains in possession, &c.

§ 2107. Actual notice consists in express information of a fact.

§ 2108. Constructive notice is notice imputed to a person not having actual notice.

§ 2109. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself.

MORGAN H. BEACH,
For Defendant in Error.